91-615

No. 91-

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

ALLIED-SIGNAL INC.
as successor-in-interest to
The Bendix Corporation,
Petitioner,

v.

DIRECTOR, DIVISION OF TAXATION
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of New Jersey

PETITION FOR A WRIT OF CERTIORARI

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101

QUESTIONS PRESENTED

1. Whether the Due Process and Commerce Clauses preclude a state from imposing a tax on income that a nondomiciliary corporation derives from the sale of its minority interest in another corporation, when the two corporations are not engaged in a unitary business and when the only connection between the taxpayer's minority investment and the taxing state lies in the taxpayer's subsequent use of the proceeds from the sale of its investment.

2. Whether this Court should now clarify, or should additionally articulate, the criteria it has set forth in *ASARCO, Inc. v. Idaho State Tax Comm'n,* 458 U.S. 307 (1982), and related cases, so as to forestall the widespread efforts of states to extend their taxing power well beyond traditional constitutional confines by taxing intangible income with which they have no substantial connection.

LIST OF PARTIES

The parties are as stated in the caption. In the courts below, the taxpayer was referred to as The Bendix Corporation. As appears in the Rule 29.1 Statement, Allied-Signal Inc. has become the successor-in-interest to The Bendix Corporation by successive mergers.

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, petitioner states that prior to January 31, 1983, The Bendix Corporation had no parent corporation. On January 31, 1983, The Bendix Corporation became a wholly-owned subsidiary of Allied Corporation, which then had no parent corporation. On March 31, 1985, The Bendix Corporation was merged into Allied Corporation. Subsequent to March 31, 1985, and prior to September 30, 1987, Allied Corporation was a wholly-owned subsidiary of The Signal Companies, Inc., which in turn was a wholly-owned subsidiary of Allied-Signal Inc. On September 30, 1987, both of these subsidiaries were merged into the parent company, Allied-Signal Inc. Allied-Signal Inc. has no parent corporation. Its non-wholly-owned subsidiaries are listed in the Appendix to this petition at App. E at 72a.[1]

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[1] All references to the Appendix in this petition are denominated "App." followed by a unique letter assigned to each item and a page reference.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Page(s)

Constitutional Provisions and Statutes

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PETITION FOR A WRIT OF CERTIORARI

This petition for a writ of certiorari seeks this Court's review of the judgment of the Supreme Court of New Jersey on a nationally important matter relating to the constitutional limitations on the power of the states to tax the income of multistate enterprises.

OPINIONS BELOW

The opinion of the Supreme Court of New Jersey (App. A at 1a–24a) is reported at 125 N.J. 20, 592 A.2d

536. The opinion of the Superior Court of New Jersey, Appellate Division (App. B at 25a–44a), is reported at 237 N.J. Super. 328, 568 A.2d 59. The opinion of the New Jersey Tax Court (App. C at 45a–67a) is reported at 10 N.J. Tax 46.

JURISDICTION

The judgment of the Supreme Court of New Jersey was entered on July 16, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment of the United States Constitution, U.S. Const., amend. XIV, § 1, provides in pertinent part that: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

Article 1, section 8, clause 3 of the United States Constitution, the Commerce Clause, U.S. Const., art. I, § 8, cl. 3, provides that: "To regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes."

Relevant portions of the New Jersey Corporation Business Tax Act, N.J. Stat. Ann. §§ 54:10A–1, –2, –4(k) (West 1986), are set forth at App. D at 68a–71a.

STATEMENT

The issues raised by this case—issues closely related to those raised in two other certiorari petitions recently filed in this Court[2] — concern the power of a state to tax the income earned by a nondomiciliary corporation from its investment in other corporations with which it has no functional connection and which it does not control. The precise question here is whether New Jersey may tax a share of the gain that a Michigan-based manufacturing corporation (Bendix) realized from the sale of its minority investment in an unrelated metal mining corporation (ASARCO). The facts, which have been stipulated, are not in dispute.

1. Bendix's Business

Petitioner Allied-Signal Inc. is the successor-in-interest to The Bendix Corporation, the original taxpayer in this case. Bendix was a Delaware corporation with its corporate headquarters and commercial domicile in Southfield, Michigan. Formed in 1929 as a manufacturer of aviation and automotive parts, Bendix gradually evolved, through both internal expansion and selective acquisition of other companies, into a multinational enterprise with operations in all 50 states and in 22 foreign countries. By the 1970s, Bendix's activities were concentrated in four core business groups: automotive,

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[2] *Corning Glass Works, Inc. v. Virginia Dep't of Taxation*, 241 Va. 353, 402 S.E.2d 35 (1991), *cert. denied*, 60 U.S.L.W. ____ (U.S. Oct. 7, 1991) (No. 90-1852); *Pledger v. Illinois Tool Works, Inc.*, 306 Ark. 134, 812 S.W.2d 101 (1991), *petition for cert. filed*, 60 U.S.L.W. ____ (U.S. Sept. 23, 1991) (No. 91-530).

aerospace/electronics, industrial/energy, and forest products.

2. Bendix's Acquisition and Sale of Its Interest in ASARCO

In 1978, Bendix purchased approximately 20.6 percent of the outstanding common stock of ASARCO, an unrelated corporation engaged in the business of mining and refining nonferrous metals. During the period that Bendix held its stock interest in ASARCO (1978–81), Bendix and ASARCO remained discrete business enterprises with virtually no corporate interaction. Aside from holding and overseeing the investment itself, which it undertook in Southfield, Michigan, Bendix did not engage in any activity in New Jersey or elsewhere that involved the nonferrous metal production business or any other business or activity in which ASARCO was engaged. Stipulation of Facts, *Bendix Corp. v. Director, Div. of Taxation*, No. 14–24–0504–84–CB (N.J. Tax Ct.), at ¶ 41.[3] Indeed, the Stipulation of Facts in this case unequivocally states that "[d]uring the period that Bendix held its investment in Asarco, Bendix and Asarco were unrelated business enterprises each of whose activities *had nothing to do with the other*." Stip. ¶ 62 (emphasis added).

In 1981, Bendix sold its ASARCO shares to ASARCO and realized a capital gain of approximately $211.5 million.

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[3] All references to the Stipulation of Facts in this case are denominated "Stip." followed by a paragraph reference.

3. The Assessment

New Jersey imposes its Corporation Business Tax ("CBT"), N.J. Stat. Ann. §§ 54:10A–1 *et seq.*, upon every corporation for the privilege of exercising its corporate franchise, doing business, employing or owning capital or property, or maintaining an office in the state. *Id.* § 54:10A–2 (App. D at 68a). The CBT is measured by a corporation's "entire net income,"[4] regardless of its connection to New Jersey. *Id.* § 54:10A–4(k) (App. D at 69a). A taxpayer's "entire net income" is defined as its federal taxable income, as adjusted for New Jersey tax purposes.[5] *Id.* A taxpayer who maintains a regular place of business outside the state may apportion its income to New Jersey by the familiar three-factor formula of property, payroll, and sales. *Id.* § 54:10A–6.

On its 1981 CBT return, Bendix excluded from its "entire net income" the gain attributable to the sale of its ASARCO stock, on the ground that New Jersey could not constitutionally include in Bendix's apportionable tax base the income from its investment in a corporation whose business activities had nothing to do with Bendix's business activities in New Jersey.[6] *See ASARCO,*

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[4] During the tax year at issue (1981), the CBT was measured both by net income and by net worth. There is no dispute here regarding the tax on net worth, which was repealed for tax years ending after June 30, 1986.

[5] None of these adjustments is at issue here.

[6] Bendix also excluded capital gain income from the sale of a subsidiary, United Geophysical Corporation, and interest income that Bendix earned on the proceeds of the ASARCO and United Geophysical sales. Although both of these items were at issue in the

Footnote Continued ...

Inc. v. Idaho State Tax Comm'n, 458 U.S. 307 (1982). The Director of the Division of Taxation determined that Bendix was not entitled to the full refund claimed on its 1981 return, based in part on his position that Bendix's gain from the sale of its ASARCO stock was taxable by New Jersey.

4. The Proceedings Below

How the federal questions were raised and passed on below. In its complaint and briefs in the New Jersey Tax Court, in its briefs in the Appellate Division of the Superior Court of New Jersey, and in its briefs in the Supreme Court of New Jersey, Bendix contended that the federal Constitution precluded New Jersey from taxing the income from the sale of its ASARCO stock. These courts explicitly noted and ruled on Bendix's Due Process and Commerce Clause objections. App. A at 1a–2a, 22a; App. B at 28a, 44a; App. C at 45a, 67a.

The decisions below. The New Jersey Tax Court and the Appellate Division of the Superior Court of New Jersey both cited this Court's decisions in *ASARCO* and *F.W. Woolworth Co. v. Taxation and Revenue Dep't*, 458 U.S. 354 (1982). App. B at 30a, 31a, App. C at 59a n.3. The Appellate Division even recognized that this Court's decisions barred the states from taxing the investment income earned by a nondomiciliary corporation from its investment in another corporation unless the two corpo-

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Footnote Continued from Previous Page

courts below, petitioner is not pressing in this Court its claims with respect to these items.

rations were engaged in a unitary business. App. B at 29a–31a. Moreover, the Appellate Division acknowledged that "*Asarco* and *F.W. Woolworth* cast a dark shadow over the Tax Court's decision . . . ." App. B at 32a. Both courts nevertheless rejected Bendix's constitutional objections, reasoning that Bendix's activities in managing its investment in ASARCO provided a sufficient link between New Jersey and Bendix's gain to permit New Jersey to tax it.

The New Jersey Supreme Court affirmed. App. A at 24a. It recognized that, in order to tax an apportioned share of the income earned by a nondomiciliary corporation conducting a multistate business within the state, the state must have a minimum connection with the activities that generate such income. That minimum connection, the court further recognized, exists when the income in question is derived from a unitary business conducted both within and without the state.

In addressing the question whether Bendix's income from its investment in ASARCO was derived from a unitary business carried on in New Jersey, however, the state court did not focus on the relationship of the underlying activities of the two enterprises as this Court had done in its unitary business opinions. *See Mobil Oil Corp. v. Comm'r of Taxes*, 445 U.S. 425 (1980); *ASARCO*; *Woolworth*. Indeed, the court took no exception to the parties' stipulation that Bendix and ASARCO had nothing to do with each other.

Rejecting the view that "[t]he tests for determining a unitary business are ... controlled ... by the relationship between the taxpayer recipient and the affiliate generator of the income that becomes the subject of the State tax," App. A at 18a, the court instead fashioned a test that fo-

cused on "the intangible nature of corporate operations ... to determine the existence of a unitary business." *Id.*

From that perspective, the New Jersey court examined Bendix's corporate policy for holding investments in stock to determine whether Bendix's gain from the sale of the ASARCO stock was apportionable under the unitary business principle. App. A at 18a–21a. Applying this test, the New Jersey Supreme Court found that Bendix had an "ingrained policy of acquisitions and divestitures" which "projected the existence of a unitary business." App. A at 21a.

The court's assertion that Bendix "had a business function of corporate acquisitions and divestitures that was an integral operational activity," App. A at 18a–19a, did not by itself demonstrate that this activity had anything to do with Bendix's operations in New Jersey. The court attempted to forge this link by looking beyond the relationship between Bendix's investment activity and its investment in ASARCO. It relied on the use that Bendix made of the proceeds from the sale of its ASARCO stock, when Bendix no longer had any connection with ASARCO. The proceeds were used to acquire stock in Martin Marietta Corporation, and "the purpose of acquiring Martin Marietta was to complement the aerospace-electronics facets of Bendix['s] business, some of which are located in New Jersey." App. A at 20a.

REASONS FOR GRANTING THE WRIT

The decision of the New Jersey Supreme Court warrants review by this Court for three compelling reasons. First, the fundamental question raised by this case—whether a state may tax the income of a nondomiciliary corporation from its investment in another corporation

with which it has no operational links—has given rise to a clear conflict among state courts of last resort that only this Court can resolve. Second, the question raised by this case is a recurring issue of profound national significance that merits plenary consideration in its own right. Third, the New Jersey Supreme Court's resolution of the question is incompatible with prior decisions of this Court and, if left undisturbed, would undermine essential constitutional constraints on state taxation and would stimulate aggressive unconstitutional taxation not only by New Jersey, but by other states as well.

I. THE DECISION BELOW CLEARLY CONFLICTS WITH THE DECISIONS OF OTHER STATE COURTS OF LAST RESORT

In holding that New Jersey could tax Bendix's income from the sale of its ASARCO stock even though Bendix and ASARCO were not engaged in a unitary business, the New Jersey Supreme Court has created an irreconcilable conflict with decisions of other state courts of last resort. The Supreme Court of Virginia and the Supreme Court of Arkansas have recently ruled that a state may not tax a nondomiciliary corporation's income from the sale of its stock in another corporation unless the two corporations are engaged in a unitary business. *Corning*; *Illinois Tool Works, Inc.* The Virginia and Arkansas decisions, and other state court rulings to the same effect, cannot be reconciled with the New Jersey court's decision in this case.

In *Corning*, the question was whether Virginia could tax an apportioned share of the capital gains and interest income that Corning Glass Works, Inc., a nondomiciliary corporation, earned from its investment in Owens-Corning Fiberglas Corporation. The underlying business

activities of Corning and Owens-Corning did not constitute a unitary business. The Virginia Department of Taxation nevertheless contended, just as the New Jersey Supreme Court reasoned in the decision below, that "Corning Glass' acquisition and divestiture of stock was 'a regular and integral' business activity which rendered its relationship with Owens-Corning 'unitary.'" *Corning*, 241 Va. at ___, 402 S.E.2d at 37 (App. in No. 90–1852 at A5). This "unitary" link purportedly provided the constitutional predicate for the Virginia Department of Taxation's effort to tax Corning's income from its investment in Owens-Corning.

The Virginia Supreme Court unequivocally rejected this line of argument. Based on its review of this Court's decisions in *Mobil, ASARCO*, and *Woolworth*, the court held that it was the underlying relationship between the business activities of Corning and Owens-Corning, not the relationship of Corning to its stock investment in Owens-Corning, that formed the touchstone of unitary business analysis. The court stated that:

> [T]he Department may not, consistent with due process, tax the capital gains and interest income that Corning Glass received from the sale of its Owens-Corning stock. The "factors of profitability" arising "from the operation of the business as a whole" do not evidence the operation of a unitary business between Corning Glass and Owens-Corning.
>
> . . . .
>
> It is true that Corning Glass had significant stock holdings in Owens-Corning and other corporations. However, this fact alone is not sufficient to support a

> legal conclusion that a unitary business relationship existed between Corning Glass and Owens-Corning.

Corning, 241 Va. at ___, 402 S.E.2d at 39–40 (App. in No. 90–1852 at A11–A12).

In *Illinois Tool Works, Inc.*, the question was whether Arkansas could tax an apportioned share of the capital gains income that Illinois Tool Works, Inc., a nondomiciliary corporation, earned from the sale of its minority interest in several other corporations. The underlying business activities of Illinois Tool Works, Inc., and these other corporations did not constitute a unitary business. The Arkansas Commissioner of Revenues nevertheless contended, much as the New Jersey Supreme Court reasoned in the decision below, that the capital gains income was taxable by Arkansas even though a unitary relationship did not exist between Illinois Tool Works, Inc., and its minority investments. *Illinois Tool Works, Inc.*, 306 Ark. at ___, 812 S.W.2d at 102–03 (App. in No. 91–530 at A2–A5).

Like the Virginia court in *Corning*, the Arkansas court in *Illinois Tool Works, Inc.* squarely rejected the rationale underlying the New Jersey Supreme Court's decision. Observing that the Arkansas Commissioner's argument was supported in part by a state court decision[7] antedating this Court's decisions in *Mobil*, *ASARCO*, and *Woolworth*, the court held that the argument could not survive these precedents. *Illinois Tool Works, Inc.*, 306 Ark.

[7] The decision was *Qualls v. Montgomery Ward & Co.*, 266 Ark. 207, 585 S.W.2d 18 (1979).

at ____, 812 S.W. 2d at 104 (App. in No. 91–530 at A7–A8). The court stated that:

> Under the "unitary business" rationale, as expressed in these decisions, the general test for determining whether a diversified group of businesses had a "unitary business" relationship was to determine whether the income that the state was attempting to tax resulted from functional integration, centralization of management, and economies of scale utilized by the corporate group.

Illinois Tool Works, Inc., 306 Ark. at ___, 812 S.W.2d at 103 (App. in No. 91–530 at A5). The conflict between the Arkansas and New Jersey Supreme Courts' reading of this Court's opinions is further illustrated by the Arkansas court's remark that this Court in *ASARCO* had rejected the argument that investment income "should be considered part of a 'unitary business' if the intangible property is acquired, managed or disposed of for purposes relating or contributing to the taxpayers' business." *Id.*[8]

Moreover, decisions of at least two additional state courts of last resort—Missouri and Florida—are in accord with the Virginia and Arkansas decisions in *Corning* and *Illinois Tool Works, Inc.* and are squarely in conflict with the New Jersey decision here, both in language and in result. *See James v. Int'l Tel. & Tel. Corp.*, 654 S.W.2d 865, 868 (Mo. 1983) (*en banc*) (*ASARCO* precludes apportionment

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[8] The Arkansas court also noted its agreement with the Virginia Supreme Court's decision in *Corning*. *Illinois Tool Works, Inc.*, 306 Ark. at ___, 812 S.W.2d at 104 (App. in No. 91-530 at A7–A8).

of capital gains income from sale of stock in nonunitary subsidiaries); *Brunner Enter., Inc. v. Dep't of Revenue,* 452 So. 2d 550, 552–53 (Fla. 1984) (*ASARCO* prohibits apportioned taxation of gain from nondomiciliary corporation's sale of stock). These important cases were all decided in the taxpayer's favor and are irreconcilable with New Jersey's position.

On the other hand, the New Jersey Supreme Court is not alone in holding that, in certain circumstances, a state may tax the income that a nondomiciliary corporation receives from its investment in another corporation even if the two corporations are not engaged in a unitary business. *See NCR Corp. v. Comptroller,* 313 Md. 118, 133–41, 544 A.2d 764, 771–75 (1988) (*ASARCO* does not prohibit apportioned taxation of income from investments in nonunitary enterprises when the investments were "actively monitored and carefully timed so as to meet [nondomiciliary taxpayer's] operating needs"); *Lone Star Steel Co. v. Dolan,* 668 P.2d 916, 924–25 (Colo. 1983) (*ASARCO* does not require unitary business relationship between income-payor and income-recipient to support apportionment of interest income on intercorporate loans made as part of lender's unitary business); *American Home Products Corp. v. Limbach,* 49 Ohio St. 3d 158, 160-162, 551 N.E.2d 201, 204–205, *cert. denied,* 111 S. Ct. 63 (1990) (*ASARCO* does not prohibit apportionment of income from investments if the taxpayer uses the investments to secure loans of working capital or needs the investments to provide funds to operate its business).

Indeed, further confirmation of the existence of a clear and substantial conflict between the decision below and the decisions of other state courts of last resort is furnished by New Jersey's own acknowledgment that such a conflict exists. In the *Corning* case, New Jersey joined 19

other states in filing an amicus brief urging this Court to grant certiorari. Brief of Arkansas, et al., as Amici Curiae in Support of Petitioner, *Virginia Dep't of Taxation v. Corning Glass Works, Inc.*, No. 90–1852. In urging this Court to grant certiorari in the *Corning* case on the ground that "ASARCO HAS PRODUCED SUBSTANTIAL CONFLICT," *id.* at 5, Amici cited, among other cases, "*Bendix Corp. v. Director*, 10 N.J. Tax 46 (1988), *aff'd*, 237 N.J. Super. 328, 568 A.2d 59 (1989), *appeal pending* N.J. Sup. Ct. No. 31, 140." *Id.* at 8 n.4. That decision was affirmed by the New Jersey Supreme Court and is the subject of this petition.

In short, the evidence that the decision below is in conflict with recent decisions of other state courts of last resort is overwhelming, and this Court should grant certiorari to resolve the conflict.

II. THE DECISION BELOW PRESENTS RECURRING CONSTITUTIONAL ISSUES OF PROFOUND NATIONAL SIGNIFICANCE WARRANTING THIS COURT'S REVIEW

Wholly apart from the conflict that the decision below has created with the decisions of other state courts of last resort, the decision warrants this Court's review in its own right. The precise scope of the constitutional restraints on the states' power to tax the investment income of nondomiciliary corporations presents recurring questions of profound national significance that call for this Court's attention and guidance.

In a series of decisions handed down during the early 1980s,[9] this Court delineated the Due Process and Commerce Clause limitations on the states' power to tax the income of a multistate business. These decisions established a number of critical principles that broadly govern constitutional decision-making in this area. Thus *Mobil* announced and *Exxon* reiterated the fundamental proposition that "the linchpin of apportionability in the field of state income taxation is the unitary business principle." *Mobil*, 445 U.S. at 439; *Exxon*, 447 U.S. at 223. *ASARCO* and *Woolworth* articulated and applied the important corollary that intangible income may not be considered part of a nondomiciliary taxpayer's unitary business merely because "the intangible property (the shares of stock) is 'acquired, managed or disposed of for purposes relating or contributing to the taxpayer's business.'" *ASARCO*, 458 U.S. at 326. And *Container* further refined the requirement that "the out-of-state activities of the purported 'unitary business' be related in some concrete way to the in-state activities" by requiring that "there be some sharing or exchange of value ... —beyond the mere flow of funds arising out of a passive investment or a distinct business operation—which renders formula apportionment a reasonable method of taxation." *Container*, 463 U.S. at 166.

Over the past decade, state courts have attempted to apply these principles to controversies over the scope of the states' power to tax the investment income earned by nondomiciliary corporations. These controversies have

[9] *Mobil; Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207 (1980); *ASARCO; Woolworth; Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159 (1983).

arisen—and continue to arise—with increasing frequency as the state tax disputes spawned by the rash of acquisitions and divestitures that dominated the American financial markets during the 1980s wend their way through the state court systems. Despite the broad guidelines that this Court provided in *Mobil, Exxon, ASARCO, Woolworth,* and *Container,* courts continue to struggle with the precise limits on the power of states to tax the income that nondomiciliary corporations earn from their investment in other corporations. The result has been an outpouring of state court decisions, many of them inconsistent with one another, that have left state taxpayers and state taxing authorities without adequate guidance in this domain.

As revealed by the cases cited above (*see* pp. 12–13, *supra*), by the cases cited in the petitions for certiorari in Nos. 90–1852 and 91–530, and by the cases cited in the amicus brief in No. 90–1852, there are many state court decisions that reflect both uncertainty and confusion regarding the constitutional constraints on the states' power to tax the investment income of a nondomiciliary corporation. This Court's guidance is sorely needed to "clea[r] up the tangled underbrush of past cases"[10] and to provide clear direction to state taxpayers, state taxing authorities, and state courts regarding the constitutional restraints on the states' power to tax the income that nondomiciliary taxpayers earn from their investment in other corporations.

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[10] *Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450, 457 (1959).

III. THE DECISION BELOW IS INCOMPATIBLE WITH PRIOR DECISIONS OF THIS COURT AND, IF LEFT UNDISTURBED, WILL UNDERMINE ESSENTIAL CONSTITUTIONAL RESTRAINTS ON STATE TAXATION

The most fundamental limitation on the states' power to tax, which is embodied in both the Due Process and the Commerce Clauses, is that there must be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Miller Bros. v. Maryland,* 347 U.S. 340, 344–45 (1954). In the context of state corporate income taxation, when a state seeks to tax the income of a business engaged in activity across state lines, this nexus requirement is reflected in the unitary business principle. Under the unitary business principle, when a multistate business is carrying on a single "unitary" business both within and without the state, that state has the requisite nexus with both the in-state and the out-of-state activities of the business to justify the state's taxing an apportioned share of the income generated by these activities. By the same token, however, when the activities carried on within the state are not unitary with the activities carried on elsewhere, the state is constitutionally constrained from including the income arising from those discrete out-of-state activities in the taxpayer's apportionable tax base.

All of this was explained in this Court's decisions in *Mobil, Exxon, ASARCO, Woolworth,* and *Container,* to which we have frequently referred above. What was made particularly clear in *ASARCO* and *Woolworth,* however, was the application of these principles to the power of a state to tax the income that a nondomiciliary corporation derived from its investment in other corporations. First, this Court flatly repudiated the argument that in-

come from investments in intangible property should be considered part of a unitary business merely because

- the intangible property (the shares of stock) is "acquired, managed or disposed of for purposes relating or contributing to the taxpayer's business," *ASARCO*, 458 U.S. at 326.

- the intangibles "contribute to or relate to or are some way in furtherance of the taxpayer's own trade or business," *id*. [or]

- th[e] "integration ... between the business use of the intangible asset (the shares of stock) and ... [the taxpayer's] business ... makes the income part of the unitary business." *Id*.

"This definition of unitary business," declared this Court, *"would destroy the concept."* *Id*. (emphasis added).

Second, this Court rejected the notion that the possession of increased economic power that a nondomiciliary corporation enjoys as a result of its investment in other corporations provides a sufficient basis for a state to tax the income that the nondomiciliary taxpayer derives from those investments. Such a theory "would trivialize th[e] due process limitation by holding it satisfied if the income in question 'adds to the riches of the corporation.'" *Woolworth*, 458 U.S. at 363. The question is whether "the out-of-state activities of the purported 'unitary business' [are] related in some concrete way to the in-state activities," *Container*, 463 U.S. at 166, not "whether the nondomiciliary parent derives some economic benefit—as it virtually always will—from its ownership of stock in another corporation." *Woolworth*, 458 U.S. at 364.

Third, this Court unequivocally declared that it could not "accept, consistently with recognized due process standards, a definition of 'unitary business' that would permit nondomiciliary States to apportion and tax dividends '[w]here the business activities of the dividend payor have nothing to do with the activities of the recipient in the taxing State.'" *ASARCO*, 458 U.S. at 327 (quoting *Mobil*, 445 U.S. at 442). Rather, there must be a substantial interconnection between the activities of the taxpayer *in the taxing state* and the corporation in which it has invested to justify the state's exercise of taxing power over the taxpayer's investment income.

Finally, this Court made it clear that the principles it articulated with respect to the states' power to tax the dividend income of a nondomiciliary corporation applied equally to the corporation's capital gains income, which is at issue here:

> Idaho and ASARCO agree that . . . capital gains income . . . should be treated in the same manner as the dividend income. . . . *We also agree*. "One must look principally at the underlying activity, not at the form of investment, to determine the propriety of apportionability." Changing the form of the income "works no change in the underlying economic realities of [whether] a unitary business [exists], and accordingly it ought not affect the apportionability of income the parent receives."

ASARCO, 458 U.S. at 330 (emphasis added, citations omitted).

The decision below runs roughshod over these principles and, if left to stand, would leave them in shambles. First, the New Jersey Supreme Court has adopted the

very definition of a unitary business that this Court said would "destroy" or "trivialize" it. Relying on the "intangible nature of corporate operations ... to determine the existence of a unitary business," App. A at 18a, and pointing to Bendix's "ingrained acquisition-divestiture policy," *id.* and "long-term planning strategy," *id.*, the New Jersey court concluded that Bendix's "capital investment activities" had become "long-term integral operational functions." App. A at 19a. But this is precisely the argument that Idaho and New Mexico made in *ASARCO* and *Woolworth* and that this Court squarely repudiated. It is no more persuasive now than it was then.

Second, the New Jersey court took no issue with the stipulated fact that "[d]uring the period Bendix held its investment in Asarco, Bendix and Asarco were unrelated business enterprises each of whose activities *had nothing to do with the other*." Stip. ¶ 62 (emphasis added). The court nevertheless concluded that Bendix's investment in ASARCO constituted part of its unitary business in New Jersey. This flies in the face of this Court's admonition that it cannot accept, consistently with recognized due process standards, a definition of a unitary business that would permit a state to tax a nondomiciliary taxpayer's income from its investment in another corporation where the business activities of the two corporations "have nothing to do with" each other in the taxing state.[11]

Third, even assuming that a taxpayer's investment activities could be characterized as a part of its unitary

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[11] As noted above, this Court has held that this admonition applies no less to capital gains income than it does to dividend income.

business, the New Jersey court fails meaningfully to distinguish Bendix's investment in ASARCO from ASARCO's and Woolworth's investments in *ASARCO* and *Woolworth* that were held not to be part of the taxpayers' unitary businesses. To be sure, the New Jersey court characterizes the taxpayer's investments in *ASARCO* as not being "'integral to nor a necessary part of [ASARCO's] business operation,'" App. A at 21a, and it observes that ASARCO did not use "'its stock as security for borrowing of working capital [to] acquir[e] stock or securities in other companies.'" *Id.* But the court does not reveal how Bendix's investment in ASARCO was more "integral" to Bendix's business operations than ASARCO's investments, in *ASARCO*, were integral to its business operations in light of the stipulated facts. Stip. ¶ 62 (no intercompany loans; no joint borrowings; no intercompany guarantees; and no pledging of the ASARCO stock).

Indeed, a comparison of the facts of *ASARCO* and *Woolworth* with those of the decision below shows that *ASARCO* and *Woolworth* actually presented *stronger* cases for finding that the taxpayers' investment activities were part of their unitary businesses than does the instant controversy. Thus ASARCO held a majority interest in Southern Peru, a producer of unrefined copper, which sold about 35 percent of its output to ASARCO. *ASARCO*, 458 U.S. at 321. Woolworth held interests in one majority-owned and three wholly-owned subsidiaries that were engaged in precisely the same line of business as it was. *Woolworth*, 458 U.S. at 356–57. Here, by contrast, Bendix held a noncontrolling minority interest in a corporation that neither sold its output to Bendix nor was engaged in Bendix's line of business. It simply blinks the facts to conclude, as did the court below, that Bendix's investment in ASARCO was a part of its unitary

business whereas ASARCO's and Woolworth's investments were not part of their unitary businesses.

Finally, even assuming that Bendix's investment activities (including its investment in ASARCO) could properly be characterized as part of its unitary business, New Jersey's effort to explain what these activities have to do with Bendix's activities *in New Jersey* is wholly unsatisfactory. The court attempted to establish such a connection by looking beyond the relationship of Bendix's investment in ASARCO itself to the use that Bendix made of the proceeds from the sale of its ASARCO stock, when Bendix no longer had any connection whatsoever with ASARCO. The court noted that the proceeds were used to acquire Martin Marietta stock, and "the purpose of acquiring Martin Marietta was to complement the aerospace-electronics facets of Bendix['s] business, some of which are located in New Jersey." App. A at 20a. But if the use of proceeds from an investment, *after the taxpayer has disposed of all of its interest in the investment*, can establish a due process link between that investment and the state in which the proceeds are subsequently invested, the due process limitations on state taxation have not merely been "trivialized," they have been utterly obliterated.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

BENDIX CORPORATION,
Plaintiff-Appellant,
v.
DIRECTOR, DIVISION OF TAXATION,
Defendant-Respondent.

Supreme Court of New Jersey.

Argued Jan. 14, 1991.
Decided July 16, 1991.

The opinion of the court was delivered by

MUIR, Jr., J.A.D., Temporarily Assigned.

On this appeal, plaintiff, Bendix Corporation, a multi-jurisdictional, non-domiciliary corporation doing business in New Jersey, argues New Jersey transgressed the due process and commerce clause limitations of the United States Constitution when the State taxed capital gains Bendix earned from the sale of all its stock in two corporate affiliates. In 1981, Bendix sold its 20.6% stock ownership in ASARCO Inc., and its 100% stock ownership in United Geophysical Corporation (UGC). New Jersey relied on the unitary business/formula apportionment method to assess the tax on the resulting capital gains and related interest. The assessment resulted in an additional tax liability of $1,845,000, which the State set off against Bendix's 1981 refund. The Tax

Court upheld the assessment. The Appellate Division affirmed. We now affirm.

I.

Bendix filed a complaint in the Tax Court challenging the deficiency assessment that arose from the Director's inclusion of the capital gains realized from the sales and related investment-account interest in the tax base of the apportionment formula employed to calculate Bendix's corporate business tax. The parties presented a stipulated record that included the deposition of W.M. Agee, chief executive officer of Bendix from 1977 to 1983. The Tax court found no constitutional infringement created by the tax imposition. It ruled Bendix a unitary business, concluding the active investment strategy that led to the capital gains made that intangible income unitary and, therefore, apportionable. The Tax Court reached its conclusion by focusing on the investment activities of Bendix rather than the activities of the corporation's affiliates or their relationship with Bendix. In making its decision, the Tax Court relied in particular on *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 103 S.Ct. 2933, 77 L.Ed.2d 545 (1983), and *Silent Hoist & Crane Co. v. Director, Division of Taxation*, 100 N.J. 1, 494 A.2d 775 cert. denied, 474 U.S. 995, 88 L.Ed.2d 359 (1985). The court also ruled Bendix failed to establish any ground for altering the statutory allocation formula employed.

The Appellate Division affirmed. 237 N.J. Super. 328, 568 A.2d 59 (1989). While that court did not "fully subscribe" to the legal distinction the Tax Court made between dividends and capital gains and emphasized the factual difference between *Silent Hoist* and this case, see id. at 336, it concurred in the Tax Court's recognition of Bendix's commitment "to a corporate strategy of

international diversified growth" as a basis for finding Bendix a unitary business. The Appellate Division also affirmed the apportionment formula for the reasons expressed by the Tax Court. Bendix, relying on R. 2:2-1(a)(1), appealed to this Court as a matter of right, asserting a substantial question under the United States Constitution.

A.

Bendix is a Delaware corporation with its principal office in Southfield, Michigan. In 1929, Bendix incorporated in Delaware. At that time it manufactured aviation and automotive parts.

In 1937, Bendix qualified to do business in New Jersey. Its operations in this State essentially consist of the production of several aerospace flight, guidance and test systems in Teterboro and of the manufacture of electric power-generating systems in Eatontown. The specific activities of Bendix in New Jersey are carefully detailed in the Tax Court opinion. 10 N.J.Tax 46 (1988).

Bendix has grown to be a multi-jurisdictional corporation with activities through direct operation or affiliates in all fifty states and twenty-two foreign countries. According to the deposition of Agee, Bendix, from 1965 to 1981, sought to diversify the company's holdings and strengthen its operations. During that period, Bendix acquired either part or all of over forty separate companies. In the same period, Bendix sold off eight or more of its affiliates or divisions, including ASARCO and UGC.

Annual reports to stockholders during the growth period reflect a methodology of selective acquisitions and

divestitures of companies to foster corporate expansion in new areas or of existing business activities. The 1969 annual report to shareholders reflects the growth program in the statement, "we intensified our efforts to expand [from businesses dependent on the government sector] in other commercial and industrial markets." The same report states, "[a]cquisitions have played a significant role in the growth of your Corporation during the past decade." The report refers to six corporate acquisitions and four corporate sales during the year.

Each annual report thereafter trumpets Bendix's strategies to pursue diversification and growth in both domestic and foreign markets. By 1975 Bendix had followed a "careful diversification . . . into four broad lines of business—automotive, aerospace-electronics, industrial-energy and shelter." Those four lines under Agee's direction changed to automotive, aerospace-electronics, forest products, and industrial-energy, with all affiliates being assigned to one of those four major operating groups. The New Jersey divisions fell essentially into the aerospace-electronics and the industrial-energy groups.

The operating groups served as the basis for vertical corporate supervision. Generally, while each subsidiary had its own management, that management reported to the chief executive of its group. The group chief executive reported to the Bendix CEO, who also served as chairman of the board. In that way, the CEO maintained almost exclusive control and decision-making power over the entire corporation. In his deposition, Agee stated he made the final decision on all acquisitions and divestitures subject to board approval where required.

Bendix maintained a planning department to advise group managers and Agee on "long and short range business proposals." Those proposals analyzed capital commitments to existing as well as new business activities, analyzed divestiture of affiliates or operating units, and evaluated acquisition candidates. As one stipulation put it, "[w]hile acquisition or divestiture was not the sole means of accomplishing certain . . . objectives, Bendix . . . engaged in selected acquisitions and divestitures of companies or assets over the years."

Agee, in his deposition, described some of the planning department's responsibilities on the strategies of growth. He characterized one of the department's responsibilities as what it takes to grow with and without capital and, if with it, how much more. These strategy reviews dovetailed with Bendix's consideration of group managers' plans for making an acquisition "in order to remain competitive" or with the general corporate goal of expansion within the existing financial base or one entailing the "need [for] more money." The record discloses evidence from which one can reasonably conclude that such acquisition decisions entailed reliance on the cash flow from divestitures as a source of capital.

By 1977, under Agee's hand, diversification and expansion had become the by-word of corporate policy. The 1977 annual report states, "we have pursued a deliberate policy of diversification both within and among our lines of business, and geographically as well, in an effort to arrive at a combination of activities that helps insulate the company as a whole from the ups and downs of any one of them."

This theme in 1978 fostered a memorandum from Agee to Bendix's planning committee entitled *Long Range*

Growth and Acquisition Planning. For the 1980s, the memorandum recommended diversification in several areas to encourage corporate growth, "rebalancing," and restructuring of a Bendix division with an eye to divestiture. The memorandum discusses the effect acquisitions would have on "near-term earnings" and notes "each major acquisition would be structured to leave us positioned financially to take the next action."

The 1978 memorandum specifically discusses several acquisitions required for "strong growth in the 80's." One of those acquisitions was ASARCO.

B.

ASARCO's appeal to Bendix stemmed from ASARCO's profitable natural resource business, some of which occurred in New Jersey. The specific nature and extent of that business is described in *ASARCO Inc. v. Idaho State Tax Commission*, 458 U.S. 307, 102 S.Ct. 3103, 73 L.Ed.2d 787 (1982).

Agee's 1978 memorandum targeted ASARCO for acquisition. The memorandum reviewed the alternatives between total acquisition and 20% stock ownership. Agee opined that, even with a minority stock ownership, Bendix's influence would be "felt" with one or two seats on ASARCO's board of directors. Agee projected the minority membership would give Bendix "access to insider information which could inhibit but not bar further acquisition of shares."

By November 1978 Bendix owned 20.6% of ASARCO's stock. Bendix gained two seats on ASARCO's board in the persons of Agee and an outside director of Bendix. While an agreement negotiated with ASARCO

placed limits on Bendix's ability to acquire more stock and despite the absence of further stock acquisitions, Bendix benefited significantly from its minority ownership. In 1979, ASARCO contributed 82 cents per share to Bendix's total earnings of $7.10 per share. In 1980, ASARCO contributed $2.22 per share to Bendix's total earnings of $7.68 per share.

During the time Bendix owned 20.6% of ASARCO, the companies had limited interaction. They shared no common officers, employees, office space, or legal services. Neither company loaned money to the other nor did either guarantee debts of the other. Also, while ASARCO subsidiaries made small arms length sales to Bendix, the companies did not make direct sales to one another. Bendix kept ASARCO's activities under review through a quarterly examination of ASARCO's books and continuous scrutiny of ASARCO's earnings by Bendix's board of directors.

In October 1980, ASARCO agreed to purchase the Bendix shares. The purchase occurred in 1981, yielding a capital gain of approximately $211,500,000. According to Agee, Bendix sold the ASARCO stock as part of its plan for restructuring the company. Agee characterized the restructuring as an effort to move into the high technology field to make the entire company less dependent on the automobile business for profits and to sell off those aspects of the corporation that did not financially or otherwise fit the "mainstream" mold Bendix's decision makers sought. Agee projected the move into the high technology field as an opportunity to benefit and complement Bendix's New Jersey operations. Bendix placed the proceeds of the stock sale in a Lehman Brothers investment account commingling them with the UGC capital gain proceeds.

C.

Bendix had purchased 100% of UGC in 1965 as part of its acquisition program. The 1965 annual report to Bendix stockholders identifies the purchase as one beyond "[mere] diversification" and part of the enhancement and improvement of Bendix's competence in geophysical services to oil companies. UGC performs seismic surveying to locate oil and natural gas sources with none of the business conducted in New Jersey.

Bendix had selective integration or unity with UGC. Bendix made one of its corporate officers, Murray Weingarten, president of UGC for a four-year period. Weingarten reorganized UGC and placed two other Bendix employees in management positions. Weingarten reported regularly to Bendix superiors. After Bendix reassigned Weingarten, the president of UGC continued to report regularly to a Bendix corporate executive and group manager. During Bendix's ownership of UGC, the subsidiary had sixteen directors and thirteen officers with simultaneous or prior employment at Bendix. However, the companies did not share patents or technology nor did they sell goods to one another. They had separate pension plans, separate personnel manuals, and did not engage in centralized purchasing or banking. UGC also did not provide services to Bendix.

Management integration occurred in other significant areas. Bendix approved Weingarten's hiring and salary decisions. Bendix also approved UGC's annual financial and strategic plans, approved capital expenditures above certain dollar limits, and kept abreast of UGC's activities through periodic reports, joint management conferences, and regular eighteen-month audits. Bendix's management control also resulted in a

veto of a UGC effort to end its marine exploration program.

Other less significant integration occurred. Bendix guaranteed UGC's California workers' compensation plan, while UGC employees participated in Bendix's workers' compensation plans as well as certain employee savings and stock ownership plans. Bendix also provided some insurance, legal, and tax advice services for compensation.

Financially, Bendix also provided assistance to UGC. The parent company financed the construction of two $1,000,000 seismic exploration ships, made periodic working capital loans at market interest rates, and capitalized $11,100,000 of UGC debt to Bendix in 1978 and 1981, which eliminated UGC's fixed obligation to repay the debt.

The UGC divestiture occurred in July 1981. Reasoned essentially on the same grounds as the ASARCO divestiture, Bendix made a capital gain of approximately $41,900,000, the proceeds of which it deposited in the Lehman Brothers investment account.

D.

The capital gains proceeds from the ASARCO and UGC stock sales did not lie idle long. After earning approximately $3,400,000 in interest, Bendix used the proceeds for essentially two purposes—to repurchase 4,000,000 shares of outstanding Bendix stock and to contribute to the acquisition of 70% of Martin Marietta's stock.

The 1981 annual report described corporate ventures made possible by the divestiture-generated capital gains. Characterizing the ventures as "ambitious aspirations for the future," the report states:

> [O]ur redeployment of assets through our divestment program also contributed significantly to net income in 1981. We completed our plan for major divestments with the sales of [ASARCO and UGC].
>
> These major strategic actions converted approximately $500 million in lower-return assets into a liquid portfolio . . . .
>
> In addition, the effective execution of this asset redeployment program generated approximately $275 million in net gains . . . These gains allowed [repurchase of] some four million shares . . . which should enhance future shareholder value.
>
> . . . .
>
> We have the capability to expand or restructure our businesses through acquisitions and other investments. A three-pronged acquisition program is well under way. . . .
>
> [The second prong is] [r]esources will be available on a continuing basis to *finance natural extensions of our existing businesses.*
>
> [The third prong is] directed toward major businesses which could provide additional dimensions to the company. [emphasis added]

Agee indicated the investment or acquisition program was foremost in his mind. Asserting he made the decision to acquire Martin Marietta, Agee stated that Martin Marietta fit "very nicely" into the financial and operational strategies of the company. He described the Martin Marietta acquisition as "very complementary and compatible with Bendix." He noted Martin Marietta was a prime contractor in many cases, and Bendix was a subcontractor. That, he reasoned, made "a lot of our technology and management philosophies and businesses . . . complementary to one another."

Agee submitted a report to the Bendix board on the proposed acquisition of Martin Marietta. In that report Agee wrote:

> [O]ur commitment to the aerospace industry would be deepened [with the acquisition], strengthening our reputation as a reliable supplier to this nation's defense and that of its allies. . . .
>
> The combined company would be stronger financially, with about double Bendix's current profits and assets.

Bendix went forward with its purchase of 70% of the stock of Martin Marietta, but before Bendix could arrange a Martin Marietta stockholders meeting to complete the takeover, maneuvering by other corporations interfered with Agee's dream. Martin Marietta and Allied Signal bought up Bendix stock, which resulted in Bendix becoming a wholly owned subsidiary of Allied Signal.

II.

The unitary business/formula apportionment method has evolved as a constitutionally acceptable standard for resolving the problem of State taxation of multi-jurisdictional corporations doing business in the taxing State. *See Container Corp. of Am. v. Franchise Tax Bd., supra,* 463 U.S. at 165, 103 S.Ct. at 2940, 77 L.Ed.2d at 553. The method

> calculates the local tax base by first defining the scope of the "unitary business" of which the taxed enterprise's activities in the taxing jurisdiction form one part, and then apportioning the total income of that "unitary business" between the taxing jurisdiction and the rest of the world on the basis of a formula taking into account objective measures of the corporation's activities within and without the jurisdiction. [*Id.*]

The unitary business principle, characterized as the "linchpin of apportionability," provides the foundation to satisfy due process and commerce clause restraints. *See Mobil Oil Corp. v. Commissioner of Taxes,* 445 U.S. 425, 439, 100 S.Ct. 1223, 1232, 63 L.Ed.2d 510, 522 (1980).

The due process and commerce clauses impose two restrictions on the authority of a State to tax income spawned by business activities of multi-jurisdictional corporations. First, there must he "a 'minimal connection' between the interstate activities and the taxing State." *See id.* at 436-37, 100 S.Ct. at 1231-32, 63 L.Ed.2d at 520 (quoting *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273, 98 S.Ct. 2340, 2344, 57 L.Ed.2d 197, 204 (1978)). Second, there

must be a rational relationship between the income attributed to the State for tax purposes and the intrastate values of the corporate business. *See id.*, 445 U.S. at 437, 100 S.Ct. at 1231, 63 L.Ed.2d at 520. In other words, if the taxing State has some tie with the corporation's interstate business and it taxes only so much of the corporate income as bears a rational relation to activities the corporation conducts in the taxing State, the tax imposed comports with constitutional restraints.

Under the unitary business principle, the minimal contacts restraint is met if a multi-jurisdictional corporation is found to be a unitary business. The principle is that so long as a multi-jurisdictional corporation's "intrastate and extrastate activities form[]part of a single unitary business," the required minimum contacts exist that entitle the taxing State to an apportioned share of all the corporation's income. *See id.* at 438, 100 S.Ct. at 1232, 63 L.Ed.2d at 521.

While the principle can be stated with ease, defining the scope of a unitary business is not as readily done. A series of United States Supreme Court opinions has shaped the defining process. *See Container Corp. of Am. v. Franchise Tax Bd., supra,* 463 U.S. 159, 103 S.Ct. 2933, 77 L.Ed.2d 545; *F. W. Woolworth Co. v. Taxation & Revenue Dep't,* 458 U.S. 354, 102 S.Ct. 3128, 73 L.Ed.2d 819 (1982); *ASARCO Inc. v. Idaho State Tax Comm'n, supra,* 458 U.S. 307, 102 S.Ct. 3103, 73 L.Ed.2d 787; *Exxon Corp. v. Wisconsin Dep't of Revenue,* 447 U.S. 207, 100 S.Ct. 2109, 65 L.Ed.2d 66 (1980); *Mobil Oil Corp. v. Commissioner of Taxes, supra,* 445 U.S. 425, 100 S.Ct. 1223, 63 L.Ed.2d 510; *Moorman Mfg. Co. v. Bair, supra,* 437 U.S. 267, 98 S.Ct. 2340, 57 L.Ed.2d 197; *Butler Bros. v. McColgan,* 315 U.S. 501, 62 S.Ct. 701, 86 L.Ed. 991 (1942); *Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell,* 283 U.S. 123, 51 S.Ct. 385,

75 L.Ed. 879 (1931); *Bass, Ratcliff, & Gretton, Ltd. v. State Tax Comm'n*, 266 U.S. 271, 45 S.Ct. 82, 69 L.Ed. 282 (1924); *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113, 41 S.Ct. 45, 65 L.Ed. 165 (1920); *Adams Express Co. v. Ohio State Auditor*, 165 U.S. 194, 17 S.Ct. 305, 41 L.Ed. 683 (1897). In *Silent Hoist & Crane Co. v. Director, Division of Taxation, supra*, 100 N.J. 1, 494 A.2d 775, we thoroughly analyzed the scope of the holdings of those cases, and we need not repeat that analysis here. What bears repeating is the tenor of those holdings.

To begin with, substance not form dictates whether a unitary business exists. We must look at the underlying activities, the economic realities of the corporation, not the form in which the income is received or other vagaries of formalism. *See Mobil Oil Corp. v. Commissioner of Taxes, supra*, 445 U.S. at 440-41, 100 S.Ct. at 1233-34, 63 L.Ed.2d at 522-23. Those dictates make resolving the issue of whether a unitary business exists fact sensitive. As the Supreme Court noted in *ASARCO*, "these cases are decided on their facts in light of established general principles." 458 U.S. at 329 n. 24, 102 S.Ct. at 3116 n. 24, 73 L.Ed.2d at 803 n. 24.

The focus on facts or underlying activities and avoidance of reliance on form to determine the existence of a unitary business is necessary because of the intangible nature of corporate activities. As noted in *Exxon*, reliance on a particular form, in that case an accounting method, for resolving the issue may not comport with the facts a State needs when it "seeks to tax values created by business within its borders." 447 U.S. at 222, 100 S.Ct. at 2119, 65 L.Ed.2d at 80 (quoting *Butler Bros. v. McColgan, supra*, 315 U.S. at 507, 62 S.Ct. at 704, 86 L.Ed. at 996). That is so because a

> State in attempting to place upon a business extending into several States "its fair share of the burden of taxation" is "faced with the impossibility of allocating specifically the profits earned by the processes conducted within its borders." [*Id.* (quoting *Underwood Typewriter Co. v. Chamberlain, supra*, 254 U.S. at 121, 41 S.Ct. at 47, 65 L.Ed. at 169).]

Consequently, the underlying economic realities as evidenced by the facts become the laser beam for resolving the unitary business issue. *See Container Corp. of Am. v. Franchise Tax Bd., supra*, 463 U.S. at 179-80, 103 S.Ct. at 2947-48, 77 L.Ed.2d at 562.

Consonant with the premise that the facts of each case govern is the Supreme Court's refusal to promulgate an exclusive test to evaluate whether a multi-jurisdictional corporation engages in a unitary business. The Court has steadfastly rejected any per se or bright line standard for defining a unitary business. *See id.* at 168, 178, 103 S.Ct. at 2941, 2947, 77 L.Ed.2d at 555, 561; *Exxon Corp. v. Wisconsin Dep't of Revenue, supra*, 447 U.S. at 221-22, 100 S.Ct. at 2119-20, 65 L.Ed.2d at 80; *Mobil Oil Corp. v. Commissioner of Taxes, supra*, 445 U.S. at 438-42, 100 S.Ct. at 1232-34, 63 L.Ed.2d at 521-24. As we stated in *Silent Hoist*, there is no single test for defining a unitary business. 100 N.J. at 18, 494 A.2d 775. Instead, there are a number of nonexclusive tests utilized to determine the existence of a unitary business.

Those tests concentrate on the intangible nature of a conglomerate's business activities that contribute to corporate income. In recognition of the fact that corporate income and profitability arise from the operation of a business as a whole, *see Mobil Oil Corp. v. Commissioner of Taxes, supra*, 445 U.S. at 438, 100 S.Ct. at 1232, 63 L.Ed.2d

at 521, the existence of exchange or transfer of value has become the predicate for satisfaction of constitutional restraints. Justice Brennan, writing for the majority in *Container*, after identifying the principles required to satisfy due process and commerce clause restraints, explained:

> [T]he principles we have quoted require that the out-of-state activities of the purported "unitary business" be related in some concrete way to the in-state activities. The functional meaning of this requirement is that there be some sharing or exchange of value not capable of precise identification or measurement—beyond the mere flow of funds arising out of a passive investment or a distinct business operation—which renders formula apportionment a reasonable method of taxation. [463 U.S. at 166, 103 S.Ct. at 2940, 77 L.Ed.2d at 554.]

Prior to *Container*, "unquantifiable transfers of value" emerged in circumstances in which corporate activities involved functional integration, centralization of management, and economies of scale. *See id.* at 164-65, 103 S.Ct. at 2939-40, 77 L.Ed.2d at 553. *See generally Mobil Oil Corp. v. Commissioner of Taxes, supra,* 445 U.S. at 438-39, 100 S.Ct. at 1232-33, 63 L.Ed.2d at 521; *Butler Bros. v. McColgan, supra,* 315 U.S. at 508-09, 62 S.Ct. at 704-705, 86 L.Ed. at 996-97. Thus, the context for determining whether a unitary business exists has, as an overriding consideration, the exchange or transfer of value, which may be evidenced by functional integration, centralization of management, and economies of scale.

In applying the tests the Supreme Court has concentrated on the relationship between the multi-

jurisdictional taxpayer parent and the affiliate when the latter pays to the parent, usually in the form of dividends, the income that is subjected to a State's apportionment tax. That concentration is pertinent here concerning UGC.

UGC was in a unitary relationship with Bendix. Bendix provided a president, other management personnel, and corporate directors from its ranks. That filling of personnel needs reflects a unitary relationship. Bendix controlled certain hiring and salary decisions of UGC's president. The president reported directly and regularly to executive and management personnel in charge of the Bendix group covering UGC's business activities. That, along with the veto of UGC's effort to terminate its marine exploration program, evidence a supervisory role exemplifying a functionally integrated enterprise illustrative of a unitary business. *See Container Corp. of Am. v. Franchise Tax Bd., supra*, 463 U.S. at 179, 103 S.Ct. at 2947, 77 L.Ed.2d at 562.

Other evidence of a unitary relationship exists. Bendix participated in UGC financial matters, which went well beyond the occasional supervision described in *F. W. Woolworth*. Bendix approved annual financial plans and expenditures over a certain dollar amount, financed ship construction, and capitalized an $11,100,000 debt that eliminated UGC's fixed obligation to repay the debt. Such conduct reflects a "flow of value" that evidences a unitary relationship.

Other Bendix activities existed that, when combined with the foregoing, suggest a unitary business. UGC employees had workers' compensation coverage under Bendix plans, as well as participation in employee savings plans. Bendix provided technical assistance, although for compensation, in the insurance, legal, and

tax fields. While such activities alone may not rise to the level of proof of a unitary business, in context with Bendix's functional and personnel integration with UGC, they lead to the conclusion that a unitary business existed.

The tests for determining a unitary business are not controlled, however, by the relationship between the taxpayer recipient and the affiliate generator of the income that becomes the subject of State tax. As has been emphasized, there is no bright line controlling test. What controls is the underlying activities that reflect the economic realities of the corporate business. In that perspective, the intangible nature of corporate operations is assessed to determine the existence of a unitary business.

From that perspective, we are satisfied the capital gains from the sale of stock in both UGC and ASARCO are apportionable under the unitary business principle. Bendix had an ingrained acquisition-divestiture policy designed to expand and enhance its existing operations as well as to move it into other fields of business. The long-term planning strategy encompassed a process focused on acquisitions, disposition of unwanted affiliates or divisions, and development of sources of capital for new acquisitions. The divestitures served at times as the capital sources for acquisitions. The strategy went well beyond the passive investments in business enterprises referenced in *Container* that are distinct from the corporation's main line of business and that have the sole primary function of diversifying the corporate portfolio and reducing risks inherent in being tied to one industry's business cycle. *See id.* at 178, 103 S.Ct. at 2947, 77 L.Ed.2d at 561. Bendix, during the period under review, essentially had a business function of corporate

acquisitions and divestitures that was an integral operational activity. That function went well beyond the nature of the investment processes in *ASARCO* and *F. W. Woolworth* that the Supreme Court found so wanting in unitary business characteristics. The investment policy did more than simply earn money to continue operations and provide a return on its capital. That is indicated, in part, by the 1981 annual report, which when referencing the capital gains from the ASARCO and UGC stock sales states those sales provided the "liquid portfolio" and provided the resource to finance "natural extensions of Bendix's existing business." That those sales were more than occasional events is mirrored by the long-term policy of continued acquisitions and divestitures, with the latter serving as a means to make the former.

When capital investment activities are long-term integral operational corporate functions rather than passive investment functions, they can serve as the basis for concluding a unitary business exists. *Cf. Container Corp. of Am. v. Franchise Tax Bd., supra,* 463 U.S. at 180 n. 19, 103 S.Ct. at 2948 n. 19, 77 L.Ed.2d at 562 (citing *Corn Prods. Ref. Co. v. Commissioner,* 350 U.S. 46, 50-53, 76 S.Ct. 20, 23-25, 100 L.Ed. 29, 34-36 (1955)). In *Corn Products,* the Supreme Court held that income gains and losses that resulted from a corn products manufacturer's purchase of and sale of corn futures constituted ordinary income rather than capital gains for tax purposes. While the ruling arose in another context, we read it as support for the conclusion we reach today.

When the investments in affiliates that generate capital gains become an integral part of a corporation's business, such that they go beyond the passive corporate investment and have as their goals the growth and expansion of existing corporate business activities rather

than just the providing of return on capital, a basis is established for making the income from those capital gains subject to a State's apportionable tax formula. *Cf. Silent Hoist & Crane Co. v. Director, Div. of Taxation, supra,* 100 N.J. at 21-22, 494 A.2d 775. Such an investment policy reflects an ordinary business practice that goes beyond the focus on the distinct nature of the affiliate's business and beyond the focus on the existence of a functional relationship or managerial relationship between the taxpayer and the affiliate. *See generally Hellerstein, State Income Taxation of Multijurisdictional Corporations and the Supreme Court,* 35 Nat'l Tax J. 401, 417 (1982). It is a policy that involves more than the concept argued by the taxing State in *ASARCO,* and found so wanting by the Supreme Court, that any intangible income should make a business unitary if it is acquired for "purposes relating or contributing to the taxpayer's business." *See ASARCO Inc. v. Idaho State Tax Comm'n, supra,* 458 U.S. at 326, 102 S.Ct. at 3114, 73 L.Ed.2d at 801. It is also a policy that creates the nexus and rational relationship required to satisfy constitutional restraints. *See Container Corp. of Am. v. Franchise Tax Bd., supra,* 463 U.S. at 165, 103 S.Ct. at 2940, 77 L.Ed.2d at 553.

Some of the evidence required to satisfy those constitutional restraints came from Agee's deposition testimony. Agee testified that the purpose of acquiring Martin Marietta was to complement the aerospace-electronics facets of Bendix business, some of which are located in New Jersey. Agee foresaw the complement in the fact that Martin Marietta's dominance in the aerospace field would enhance the theretofore subordinate or limited activity of Bendix in that field. While the nature of that complement is intangible, it suggests a flow of value analogous to, although different in focus

from, that recognized in *Container* for finding a unitary business. *Cf. id.* at 166, 103 S.Ct. at 2940, 77 L.Ed.2d at 554.

Even though the Martin Marietta takeover never came to fruition, the fact that it served as a goal for part of the capital generated by the sales of ASARCO and UGC stock nurtures the premise that Bendix's ingrained policy of acquisitions and divestitures projected the existence of a unitary business. The nature of that policy as effectuated demonstrates the presence of a unitary business. The policy also precludes Bendix from meeting its "distinct burden of showing by 'clear and cogent evidence' that [the State tax] results in extraterritorial values being taxed." *Exxon Corp. v. Wisconsin Dep't of Revenue, supra,* 447 U.S. at 221, 100 S.Ct. at 2119, 65 L.Ed.2d at 80.

Contrary to Bendix's assertion, the holdings of *ASARCO* and *F. W. Woolworth* do not dictate a reversal of the decision of the Appellate Division. Both *ASARCO* and *F. W. Woolworth* are factually distinguishable. ASARCO's stock investments were "not integral to nor a necessary part of [ASARCO's] business operation." *ASARCO Inc. v. Idaho State Tax Comm'n, supra,* 458 U.S. at 324 n. 21, 102 S.Ct. at 3113, n. 21, 73 L.Ed.2d at 800 n. 21 (quoting the jurisdictional statement). Also, ASARCO did not use "its stock as security for borrowing of working capital [to] acquire stock or securities in other companies." *Id.* Beyond that, neither *ASARCO* nor *F. W. Woolworth* involved the purchase of 4,000,000 shares of outstanding corporate stock to enhance the stockholder value in the corporation. Also, in neither *ASARCO* nor *F. W. Woolworth* did the taxing State produce any facts that demonstrated the minimal contacts and rational relationships required to satisfy constitutional restraints.

Those differences preclude *ASARCO* and *F. W. Woolworth* from controlling here.

In sum, all the capital gains here are income derived from an activity that is integrally related to the conduct of a unitary business. Consequently, it is unitary business income that is subject to apportionment. Moreover, the UGC capital gains are income derived from an asset that is integrally related to a unitary business and similarly taxable. The economic realities of Bendix's corporate activity demonstrate New Jersey's apportioned tax on the capital gains and related interest satisfy all constitutional restraints.

III.

We turn now to Bendix's alternative argument that "an adjustment to Bendix's allocation factor is required" pursuant to N.J.S.A. 54:10A-8. Bendix contends that we should require the Director to modify the apportionment formula to include the property, sales, and payrolls of ASARCO and UGC to the extent of Bendix's percentage of stock ownership in those companies. *See Silent Hoist & Crane Co. v. Director, Div. of Taxation, supra,* 100 N.J. at 11-14, 494 A.2d 775 (explaining New Jersey's tax apportionment formula).

Bendix's principal argument is that "[a]part from constitutional considerations," the Director abused his discretion in denying Bendix's request for an adjustment to its allocation factor under N.J.S.A. 54:10A-8. We do not view that to be a substantial constitutional issue for which R. 2:2-1(a)(1) affords a right of appeal to this Court. *See Piscataway Assocs. v. Township of Piscataway,* 73 N.J. 546, 549, 376 A.2d 527 (1977). Therefore, we decline to consider that argument.

To the extent Bendix suggests an issue of constitutional dimension, we conclude, as did the Tax Court and Appellate Division, Bendix failed to meet its burden of proof. Bendix argues the apportionment formula utilized does not actually reflect a reasonable sense of how the income was generated, relying on *Container, supra,* 463 U.S. at 169, 103 S.Ct. at 2942, 77 L.Ed.2d at 556. Bendix, however, made no actual demonstration of unfairness and instead relied upon notional assertions. As we stated in *United States Steel Corp. v. Director, Division of Taxation,* 38 N.J. 533, 547, 186 A.2d 266 (1962):

> The most that has been shown is that a tax upon a modification of the statutory formula would be less than upon the formula as written. That hardly proves that the formula in fact allocated to New Jersey any extraterritorial property or activity, let alone so much as would meet the exacting test of a palpable misapportionment.

We are required to strike down an apportionment formula only when the taxpayer establishes by clear and cogent evidence that there is no rational relationship between the income attributed to the State and the intrastate values of the corporation by proving that the apportioned income is out of all appropriate proportion to the business the taxpayer transacts in the State. *See Container Corp. of Am. v. Franchise Tax Bd., supra,* 463 U.S. at 170, 180-81, 103 S.Ct. at 2942, 2948-49, 77 L.Ed.2d at 556, 563. We are not required to disturb an apportionment formula so long as the State, in applying the formula to a unitary business taxpayer's total income, obtains a "'rough approximation' of the corporate income that is 'reasonably related to the activities conducted within the taxing State.'" *See Exxon Corp. v. Wisconsin*

Dep't of Revenue, supra, 447 U.S. at 223, 100 S.Ct. at 2120, 65 L.Ed.2d at 81 (quoting *Moorman Mfg. Co. v. Bair, supra,* 437 U.S. at 273, 98 S.Ct. at 2344, 57 L.Ed.2d at 204). We find no evidence in the record to establish the required distortions or absence of reasonable relationship. Bendix has not sustained its burden of proof.

IV.

We would be remiss were we not to make one final observation. Cases of this nature are the quintessential example of the tenet that facts, not principles of law, decide cases. *See Feldman v. Lederle Laboratories,* 97 N.J. 429, 455, 479 A.2d 374 (1984) (citing *Konrad v. Anheuser-Busch, Inc.,* 48 N.J. Super. 386, 388, 137 A.2d 633 (Law Div. 1958)). Our decision today should not be read beyond the scope of the facts of the case.

Affirmed.

APPENDIX B

BENDIX CORPORATION,
Plaintiff-Appellant,
v.
DIRECTOR, DIVISION OF TAXATION,
Defendant-Respondent.

Superior Court of New Jersey, Appellate Division.

Argued May 22, 1989.
Decided Oct. 19, 1989.

Before Judges DEIGHAN, BAIME AND D'ANNUNZIO.

The opinion of the court was delivered by

D'ANNUNZIO, J.A.D.

Bendix Corporation (Bendix) appeals a Tax Court judgment affirming a Division of Taxation decision to add three income items to Bendix's income for its fiscal year which ended September 30, 1981. *Bendix Corp. v. Taxation Div. Director,* 10 N.J.Tax 46 (1988). The three items are:

(1) a $ 211.5 million capital gain from Bendix's sale of 20.6% of the outstanding stock of Asarco, Inc. (Asarco);

(2) a $ 41.9 million capital gain from Bendix's sale of 100% of the outstanding stock of United Geophysical Corporation (UGC); and

(3) $ 3.4 million interest Bendix earned on the proceeds of the Asarco and UGC stock sales.

The addition of these items increased Bendix's tax base under New Jersey's Corporation Business Tax Act (1945), N.J.S.A. 54:10A-1 *et seq.*, and, therefore, increased Bendix's tax.

I. BASIC FACTS

The facts are not in dispute as the case was tried on stipulated facts and exhibits and a deposition of W.M. Agee, a former Bendix chief executive.

During the tax year in question, Bendix was a Delaware corporation, incorporated in 1929, with its principal office in Michigan. Bendix commenced business as a manufacturer of aviation and automotive parts. By 1981 Bendix was a multinational corporation operating directly or through subsidiaries in all 50 states and 22 other countries, and its business had expanded beyond basic aviation and automotive business to include four major operating groups: (a) automotive; (b) aerospace/electronics; (c) industrial energy; (d) forest products.

In 1981, Bendix operated several units of its aerospace group in Teterboro, New Jersey, and manufactured electric generating systems in Eatontown, New Jersey. In addition, a wholly owned subsidiary, Bendix's Field Engineering Corporation, provided ocean current, weather and other information worldwide to the

trans-oceanic shipping industry through its Marine Science Services Division in Teterboro and provided facilities management and support services to an Environmental Protection Agency facility in Edison, New Jersey. Bendix sold its full range of products and services to New Jersey customers and stored inventory in New Jersey.

Bendix acquired 20.6% of Asarco's outstanding stock between December 1977 and November 1978. Asarco mined and produced copper, lead, zinc, silver and other non-ferrous metals, as well as asbestos and coal, in Latin America and other countries. *See ASARCO Inc. v. Idaho State Tax Comm'n.*, 458 U.S. 307, 102 S.Ct. 3103, 73 L.Ed.2d 787 (1982) for a more detailed description of Asarco's activities. As a result of its equity position in Asarco, two Bendix executives became members of Asarco's 14-member board of directors. Asarco contributed $.82 a share to Bendix's 1979 earnings of $ 7.10 a share, and $ 2.22 a share to Bendix's 1980 earnings of $ 7.68 a share.

In late 1980, Bendix decided to sell its Asarco stock because it had appreciated considerably and Bendix had decided to reduce its position in the natural resource business. The sale yielded three times Bendix's initial investment.

In 1965, Bendix purchased all of the stock of United Geophysical Corporation (UGC). UGC performed seismic surveys for the oil and gas industry. UGC transacted no business in New Jersey. Bendix employees managed UGC through service on UGC's board or as UGC corporate officers. Bendix approved UGC's annual financial plans, its major capital expenditures and

financed the construction of two ships to be used by UGC in marine seismic exploration.

In 1980, Bendix took advantage of an opportunity "to divest UGC at a very favorable price" and sold all of the UGC stock for $ 80 million, yielding a $41.9 million capital gain.

In 1981, Bendix placed the proceeds of the Asarco and UGC sales in an interest bearing investment account outside New Jersey. The investments generally carried maturities of less than 90 days and generated $ 3.4 million interest during fiscal 1981.

Bendix contends that New Jersey's inclusion of the Asarco and UGC capital gains in the corporate business tax base was an unconstitutional taxing of extra-territorial values.

II. PRINCIPLES OF LAW

A state may look beyond its borders in taxing the property of foreign corporations to allow it to

> get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they otherwise would possess. [*Wallace v. Hines*, 253 U.S. 66, 69, 40 S.Ct. 435, 436, 64 L.Ed. 782 (1920)].

This principle was applied in *Bass, Ratcliff & Gretton v. State Tax Commission*, 266 U.S. 271, 45 S.Ct. 82, 69 L.Ed. 282 (1924), to uphold a New York franchise tax imposed on an English brewer.

> So in the present case we are of the opinion that, as the Company carried on the unitary business of manufacturing and selling ale, in which its profits were earned by a series of transactions, beginning with the manufacture in England and ending in the sales in New York and other places . . . the state was justified in attributing to New York a just proportion of the profits earned by the Company from such unitary business. [*Id*. at 282, 45 S.Ct. at 84].

Because the taxpayer's New York activities were part of the "unitary business" of brewing and marketing ale, New York taxing authorities were permitted to measure the tax base by all of the taxpayer's worldwide income. This base was then apportioned to New York by the proportion the value of the taxpayer's New York property bore to the total value of all the taxpayer's property ($ 44,117/$ 3,501,483).

The unitary business principle was considered recently by the United States Supreme Court in a series of cases beginning in 1980. In *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 100 S.Ct. 1223, 63 L.Ed.2d 510 (1980), the Court upheld Vermont's inclusion in Mobil's tax base of dividends Mobil received from its subsidiaries and affiliates doing business abroad. Mobil was a New York corporation which marketed petroleum products in Vermont. Mobil had no production or refining facilities in Vermont.

The Court stated the general principle that to tax income generated in interstate commerce Due Process requires a minimal connection between the interstate activities and the taxing state, and a rational relationship between the income attributed to the state and the

intrastate values of the enterprise. The Court ruled that Mobil failed to establish that the income was earned in the course of activities unrelated to the sale of petroleum products in Vermont. It was satisfied that the foreign activities were part of Mobil's integrated petroleum enterprise.

> So long as dividends from subsidiaries and affiliates reflect profits derived from a functionally integrated enterprise, those dividends are income to the parent earned in a unitary business. One must look principally at the underlying activity, not at the form of investment, to determine the propriety of apportionability. [*Id*. at 440, 100 S.Ct. at 1233.]

In *Exxon Corp. v. Wisconsin Dept. of Revenue,* 447 U.S. 207, 100 S.Ct. 2109, 65 L.Ed.2d 66 (1980), the Court rejected Exxon's argument that its maintenance of three discrete departments for Exploration/Production, Refining and Marketing, each with separate financial accounts, required the exclusion of non-marketing income from its Wisconsin tax base.

Mobil and *Exxon* involved vertically integrated economic units. *ASARCO Inc. v. Idaho State Tax Commission, supra,* involved dividend and interest income from corporations in which Asarco owned major interests but which engaged in the same business as Asarco, the mining and production of non-ferous metals. Although there was some movement of product between Asarco and the subsidiaries, the corporate relationships more closely resembled a horizontal combination. Asarco's stock interests in the five subsidiary corporations ranged from 34% to 53%.

Silver mining was Asarco's principal Idaho activity, although it mined and sold other Idaho minerals and operated its northwest mining division's administrative office in Idaho. Only 2.5% of Asarco's total business activity occurred in Idaho. The subsidiaries were not active in Idaho.

The court rejected Idaho's contention that income from intangible property is part of a unitary business if it contributes to or furthers the taxpayer's business.

> This definition of unitary business would destroy the concept. The business of a corporation requires that it earn money to continue operations and to provide a return on its invested capital. Consequently *all* of its operations, including any investment made, in some sense can be said to be "for purposes related to or contributing to the [corporation's] business." When pressed to its logical limit, this conception of the "unitary business" limitation becomes no limitation at all. [*Id.*, 458 U.S. at 326, 102 S.Ct. at 3114.]

The Court applied a similar rationale to defeat the inclusion of a subsidiary's dividend in *F.W. Woolworth Co. v. Taxation & Rev. Dept.*, 458 U.S. 354, 102 S.Ct. 3128, 73 L.Ed.2d 819 (1982). Three of the subsidiaries were wholly owned; Woolworth owned 52% of the fourth subsidiary. Each subsidiary operated in a different country outside the United States, and each was in the same business as the parent, chainstore retailing of a variety of consumer goods. There was no centralized management and each subsidiary enjoyed business autonomy.

Asarco and *F.W. Woolworth* cast a dark shadow over the Tax Court's decision in the present case. However, their precedential value was weakened by the Court's subsequent decision in *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 103 S.Ct. 2933, 77 L.Ed.2d 545 (1983). Moreover, *Asarco* and *Woolworth*, like *Mobil* and *Exxon*, were single-industry companies, unlike Bendix.

Container Corporation of America (hereafter Container Corp.) was a vertically integrated manufacturer of paperboard packaging operating in the United States. It as a Delaware corporation headquartered in Illinois, and did business in California, the taxing state. Container Corp. controlled 20 foreign subsidiaries, located in Latin America and Europe, through stock ownership ranging between 66% and 100%. For the most part, these subsidiaries were fully integrated paperboard manufacturers enjoying autonomy "with respect to matters of personnel and day-to-day management." *Id.*, 463 U.S. at 172, 103 S.Ct. at 2943. No more than 1% of the subsidiaries' material purchases were from Container Corp.

The court reaffirmed the unitary business principle, but, despite substantial similarities with the facts in *Asarco* and *F.W. Woolworth*, the Court upheld the inclusion of the subsidiaries' income in Container Corp.'s franchise tax base. The Court distinguished *Asarco* and *F.W. Woolworth* in the following terms:

> The state Court of Appeal relied on a large number of factors in reaching its judgment that appellant and its foreign subsidiaries constituted a unitary business. These included appellant's assistance to its

> subsidiaries in obtaining used and new equipment and in filling personnel needs that could not be met locally, the substantial role played by appellant in loaning funds to the subsidiaries and guaranteeing loans provided by others, the "considerable interplay between appellant and its foreign subsidiaries in the area of corporate expansion," . . . the "substantial" technical assistance provided by appellant to the subsidiaries, . . . and the supervisory role played by appellant's officers in providing general guidance to the subsidiaries. In each of these respects, this case differs from ASARCO and F.W. Woolworth, and clearly comes closer than those cases did to presenting a "functionally integrated enterprise," . . . which the State is entitled to tax as a single entity. We need not decide whether any one of these factors would be sufficient as a constitutional matter to prove the existence of a unitary business. Taken in combination, at least, they clearly demonstrate that the state court reached a conclusion "within the realm of permissible judgment." [Id. at 179-180, 103 S.Ct. at 2947-2948; citations and footnotes omitted.]

The Court recognized that application of the unitary business principle was excruciatingly fact sensitive, and as long as the correct legal standard was applied, the Court limited its role to determining whether the state court's judgment "was within the realm of permissible judgment." *Id.* at 176, 103 S.Ct. at 2946. The Court cautioned, however, that "the mere flow of funds arising out of a passive investment or a distinct business operation," *id.* at 166, 103 S.Ct. at 2940, was not enough to relate a taxpayer's out-of-state activities "in some concrete way to the in-State activities." *Ibid.* What is

required is "some sharing or exchange of value not capable of precise identification or measurement . . . which renders formula apportionment a reasonable method of taxation." Ibid.

III. THE TAX COURTS DECISION

The Tax Court in the present case distinguished between capital gains from the sale of an interest in a subsidiary corporation and dividends paid by a subsidiary. According to the Tax Court, in a capital gains context, such as this case, the focus must be on Bendix's income and activities, and not on how Asarco or UGB earned its income. "The activities in issue are investment activities, and the unitary business question is resolved . . . by examining taxpayer's activities in managing the investment, not the nature of the activities of the subject of the investment." 10 N.J.Tax at 59. After examining Bendix's involvement in Asarco, the Tax Court concluded that Due Process did not preclude inclusion of the Asarco capital gain in Bendix's tax base because Bendix's Asarco investment was "a significant part of the Bendix corporate strategy." *Ibid.*

> The purchase of a minority share in Asarco was part of a Bendix plan for growth and diversification in the 1980's which called for investing in depressed and undervalued basic resources to achieve the planned result of a stronger, diversified company. This investment was made only after a thorough analysis of the copper industry and the qualities of specific acquisition candidates. The Asarco investment was part of a well-orchestrated corporate strategy designed to enhance Bendix's current status, as well as position Bendix for the future. To describe this investment as

> passive would ignore the New Jersey Supreme Court's decision in *Silent Hoist* and disregard economic reality. The determination of the New Jersey Supreme Court in *Silent Hoist* has set the course for this court to follow. [10 N.J.Tax at 59-60.]

Silent Hoist & Crane v. Taxation Div. Director, 100 N.J. 1, 494 A.2d 775 (1985), heavily relied upon by the Tax Court in this case, involved a New York corporation with its principal place of business in New York. It sold cranes in New Jersey, but its manufacturing plant was in New York. It also owned two commercial properties in New Jersey and had passive investment income. The Supreme Court reversed a Tax Court decision that the taxpayer's investment, real estate and sales businesses were distinct business enterprises and should not be taxed as a unitary business.

Although we do not fully subscribe to the legal significance attached to the distinction between dividends and capital gains, and despite the obvious factual differences between *Silent Hoist*, a one-man corporation, and the present case, we agree in general with the Tax Courts approach. By 1981 Bendix had developed beyond its root business of manufacturing aviation and automotive equipment to become a diversified international corporation. The Tax Court's opinion recognized that by 1981 Bendix was committed to a corporate strategy of international diversified growth. The record establishes that Bendix acquired assets based on their fit within the framework of existing Bendix operations and their utility as stepping stones to additional acquisitions, and not merely for their capacity to generate income.

IV. THE RECORD IN DETAIL

As previously indicated, the Tax Court decided this case on a stipulation of facts, the stipulated deposition of W.M. Agee (Agee), Bendix's CEO from January 1977 to June 1983, and on stipulated exhibits. The factual stipulation consists of 165 numbered paragraphs totaling 45 pages. The exhibits, lettered A through U, total 370 pages. Agee's deposition is 123 pages. The Tax Court's opinion referred only to the basic facts. Some of the details give a much better picture of Bendix and its goals.

Bendix maintained a planning department which "considered, analyzed and developed long and short range business proposals . . ." Stip., para. 27.

> Consistent with this objective, the planning department would analyze trends in the types of businesses Bendix was engaged in and ways to respond to those trends such as (i) increasing or decreasing capital commitment to particular product or services, (ii) greater or lesser expenditures by Bendix on research and development as to particular products or services, (iii) offering new or discontinuing (by divestiture of subsidiaries or other operating units or otherwise) existing Bendix products or services, or (iv) entry into a new product or service area either by developing the new product or service from within or by acquiring the assets, employees or technology for that new product or service through acquisition. The Bendix planning department, as the need arose, also evaluated acquisition candidates. *While acquisition or divestiture was not the sole means of accomplishing certain of the above-mentioned*

> *objectives, Bendix, as many other major corporations, engaged in selected acquisitions and divestitures of companies or assets over the years.* [Stip., para 27; Emphasis supplied.]

> 28. As described by A. Matthew Lord, Director of Corporate Development in the Bendix planning department, during his tenure in the planning department (1975-1982) Bendix had three major strategies for growth: (1) exploit its existing businesses, (2) move into related areas, and (3) move into unrelated areas with strong growth potential. [Stip., para. 28.]

In the late 1970's Bendix turned its attention, in part, to the acquisition of a natural resource company. On March 31, 1978, Agee addressed a lengthy memorandum to Bendix's *Long Range Planning Committee entitled Long Range Growth and Acquisition Planning*. (Exhibit E.) Initially, Agee defined some corporate goals for the next decade.

> We believe ourselves to be strong enough financially and managerially to warrant several major moves aimed at growth and diversification for the 80's.
>
> * Growth and diversification in the Industrial/Energy area.
>
> * Growth and rebalancing in the forest products area.
>
> * Investment in other basic resources that are now depressed and undervalued but that offer strong profit possibilities for the 80's.

> * Restructuring of Bendix Home Systems with a view to possible withdrawal in the next few years.

Agee then described the potential impact of attaining these goals:

> These actions might slow down somewhat the growth in our near-term earnings. But we would be building towards rapid growth in earnings in the early 80's.
>
> We would be tilting our activities in the directions that may, on the whole, make us somewhat more cyclical than we have been but with compensating higher growth.
>
> We would be well able over the period to keep our balance sheet within the 65/35 ratio that is so important for us. Each major acquisition would be structured to leave us positioned financially to take the next action.
>
> We would probably face a significant increase in goodwill from acquisitions, but it is not entirely clear that this is so. We would have no trouble in maintaining our growth in dividends.
>
> The program that we have in mind would require some significant increase in our total capitalization. Part of this would come about in any case because we will generate an annual increase in net worth averaging approximately $ 100 million over the next five years. Leveraging this to the 2:1 debt ratio with which we are comfortable permits an increase in capitalization of over $ 300 million in the next two years and well

> over $ 750 million over 5 years. The use of preferred securities for acquisitions would, of course, strengthen our equity base thus permitting further debt. The sale of common stock is also open to us.

These observations underscored the interdependence of Bendix's existing businesses and long-term strategic planning. Agee also noted the positive relationship between acquisitions and growth "If we are to find strong growth in the 80's, acquisitions must be made. As noted before, we have the financial means for doing so." One of the acquisitions discussed in Agee's memorandum is that of Asarco, referred to by the code name Blackie. Agee expressed interest in acquiring a mining company "because we are bullish on basic resources for the balance of the century."

Agee's memorandum described Blackie and discussed alternative methods of acquisition from a purchase of 100% of its stock to acquiring a 20% interest which would permit earnings consolidation. Agee expressed a preference for the 20% position because financially it was more manageable and would give Bendix "time to become more familiar with the company and the industry *before chancing a significantly larger position*." [Emphasis supplied.] Moreover,

> On the matter of control. It does not follow that our influence in the company is only nominal because we would lack 51%. If we were to enjoy a good relationship with Blackie—with a seat or two on the Board—our influence could be felt. Much would depend, of course, on whether Blackie resisted or accepted our presence—about which more is said later. Even if it [***20] initially resisted, in due course it could

come around to accept if not welcome our presence and advice.

. . . .

Assuming success, what would happen next? We would organize ourselves to form a shadow group here to learn as much as we can about the company and the industry. If our nominees entered Blackie's Board, we would gain access to insider information which could inhibit but not bar further acquisition of shares. Within a time that cannot now be defined, we would decide on whether to enlarge or sell our holdings and, if so, how to do so. It is our intention not to let the matter dawdle. [Emphasis supplied.]

Agee's memorandum was followed by his April 12, 1978 recommendation to Bendix's Board of Directors that Bendix acquire up to 20% of Asarco's stock. Agee expressed the following reasons for his recommendation:

This acquisition clearly will aid us in our acquisition strategies whose purposes are:

* Reducing our dependence on the relatively slow-growing aerospace and automotive OEM market.

* Broadening our Industrial/Energy Group to give it size and better definition.

* Generating good cash flow in the early 1980's to meet growing capital needs, particularly in aerospace/electronics to permit it to hold its own in stiffening markets.

* Broadening our holding in basic commodities, particularly forest products and in non-fuel minerals that should prosper from the energy problem or which have other reasons for strong market position in the 1980's.

ASARCO clearly meets the last objective. We have actively in mind acquisitions in the forest products and industrial areas which we hope to bring to the Board in the not too distant future.

The Board approved the recommendations. Bendix paid $ 127,649.017 for the stock. It borrowed $ 110 million and paid the balance with internally generated cash.

In September 1979, Agee, with the approval of Bendix's Board, proposed a merger of Bendix and Asarco. Asarco's Board of Directors resisted and the matter was not pursued.

V. BENDIX ACQUISITION HISTORY

Bendix's Asarco acquisition was not an isolated event. It was part of a long-range acquisition policy described in paragraphs 130-153 of the stipulation.

In 1966, Bendix acquired seven companies, including one which produced medical electronics equipment for physicians and a company which produced fiber optics. Bendix acquired five companies in 1967 and five companies in 1968.

Bendix's 1969 Annual Report to Shareholders stated:

> Recognizing the vital necessity to broaden the base of our business so as to be less dependent on the government sector, we intensified our efforts to expand in other commercial and industrial markets.
>
> . . . . .
>
> Acquisitions have played a significant role in the growth of your corporation during the past decade.

Bendix made six acquisitions in 1969, including the Skagit Corporation which was involved in "logging equipment and systems and other handling equipment." Paragraph 130 of the stipulation describes the Skagit acquisition as "an acquisition in business areas in which [Bendix] had no existing specific involvement."

In 1970, Bendix merged with American Forest Products Corporation, which was described as Bendix's largest acquisition to date and "represented a new market for Bendix." American Forest Products Corporation was in the timber management, lumber, building materials, wood and corrugated containers, and aluminum siding businesses.

Bendix acquired six "relatively small" companies in 1971 and acquired a 50% interest in two European companies.

The 1972 Annual Report to Shareholders included a statement by Bendix's chairman that Bendix was pursuing "broad corporate strategies to further increase the non-government segment of our business, to pursue the diversification of our major lines of business, to

expand our role in non-cyclical or counter-cyclical markets and to increase our international involvement."

In 1973, Bendix acquired Boise Cascade's International Mobile Home and Recreational Vehicle businesses, reorganizing them as Bendix Home Systems. The 1973 Annual Report to Shareholders stated that Bendix "continued our policy of disposing of minor operations which do not relate to our long-range business strategy."

In 1976 Annual Report noted that Bendix's earning record in the 50's and 60's was "spotty" because of dependence on government work and on "the cyclical ups and downs of the industries [Bendix] served."

The 1977 Annual Report stated that "we have pursued a deliberate policy of diversification both within and among our lines of business, and geographically as well, *in an effort to arrive at a combination of activities that helps insulate the company as a whole from the ups and downs of any one of them.*" [Emphasis supplied.] This theme was repeated in the 1978 Annual Report in which the chairman noted that Bendix has "successfully pursued a strategy of diversification which has brought us resistance to the ill effects of swings in the business cycle. First, we are in four major businesses: automotive, aerospace-electronics, forest products and industrial-energy. Second, within each of these, we are all diversified."

This brief history demonstrates an acquisition policy focused, in part, upon diversification designed to reduce reliance on government work and to moderate the business cycle's impact. Bendix's Asarco acquisition was consistent with and furthered this policy and the record

supports a finding, implied in the Tax Court's decision, that Bendix's unitary business included implementation of this policy of acquiring interests in diverse industries to achieve the goals of growth, cyclical protection and corporate balance. *But see, James v. International Telephone and Telegraph Corp.*, 654 S.W.2d 865 (Mo. 1983), which rejected a similar unitary business analysis.

A similar analysis applies to UGC. Moreover, Bendix owned 100% of UGC and was directly involved in its management, capital financing and operations.

For the reasons above stated, we conclude that the capital gains earned from the sales of Asarco and UGC stock were properly included in Bendix's New Jersey tax base.

The Tax Court's inclusion in the tax base of the interest Bendix earned on the sale proceeds and the Tax Court's rejection of Bendix's attack on the allocation formula are affirmed for the reasons expressed by the Tax Court.

APPENDIX C

BENDIX CORPORATION,
Plaintiff,
v.
TAXATION DIV. DIRECTOR,
Defendant.

14-24-0504-84CB

Tax Court of New Jersey

June 30, 1988

LASSER, P.J.T.C.

Plaintiff, Bendix Corporation ("Bendix"), contests a corporation business tax (N.J.S.A. 54:10A-1 et seq.) deficiency assessment resulting from the addition by the Director, Division of Taxation, of three items of income to Bendix's income for its fiscal year ended September 30, 1981. Bendix contends that this income was not earned as part of Bendix's unitary business, and that the Director's inclusion of these items violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The three items of income which Bendix claims may not constitutionally be included by the Director in the income tax measure of its corporation business tax liability are:

(a) capital gain of approximately $211.5 million realized on Bendix's sale of its 20.6% stock interest in Asarco, Inc. ("Asarco");

(b) capital gain of approximately $41.9 million realized on Bendix's sale of the stock in its wholly-owned subsidiary, United Geophysical Corporation ("UGC"); and

(c) interest of approximately $3.4 million earned on the proceeds of the sale of Bendix's interest in Asarco and UGC.

In the event the court determines that these items of income are properly includable, Bendix seeks an adjustment of the fiscal 1981 allocation factor in accordance with N.J.S.A. 54:10A-8, contending that the statutory allocation factor used by the Director does not reflect the receipts, payroll or property of Asarco and UGC. Director denies that the assessment is either improper or unconstitutional or that the allocation factor operates unfairly.

I

In 1981 Bendix[1] was a corporation organized under the laws of the State of Delaware, and had its principal office and commercial domicile at Bendix Center, Southfield, Michigan. Bendix was incorporated in

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[1] Bendix became a wholly-owned subsidiary of Allied Corporation in 1983 and was merged into Allied as of April 1, 1985.

Delaware in 1929 as a manufacturer of aviation and automotive parts.[2]

Over the years, Bendix developed into a multinational corporation with activities, either directly or through subsidiaries or other operating units, in all 50 states and 22 foreign countries. Bendix's core businesses expanded along several basic lines, so that for the period 1970 to 1981 there were four major Bendix operating groups (the "Major Groups"): (a) automotive; (b) aerospace/electronics; (c) industrial/energy and (d) forest products. For operational purposes, the various Bendix subsidiaries or other operating units were included by Bendix in one of the Major Groups, based on the type of business activity engaged in by that subsidiary or operating unit. Each subsidiary or operating unit had its own management which, in turn, reported to the chief executive of the Major Group in which the subsidiary or operating unit was included. The chief executives of the Major Groups reported directly to the chairman and chief executive officer of Bendix.

In 1937, Bendix obtained a certificate of authority to transact business in New Jersey. At all times relevant to this action, it was qualified to transact business in New Jersey, and its New Jersey activities consisted primarily of the operation of several Bendix units in the Aerospace Group at Teterboro, New Jersey, including Aerospace Flight Systems, Guidance Systems and Test Systems, and

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[2] The case was submitted to the court for decision on stipulated facts, from which the court's recital of the facts is drawn.

the manufacture of electric power-generating systems at a plant in Eatontown, New Jersey.

The Bendix Aerospace Flight Systems Division at Teterboro developed and manufactured flight control systems, cockpit displays, flight and engine instrumentation, air data computers, engine control systems, air inlet control systems, pressure and position sensors and transducers, and weapon release and control systems. In addition, supporting maintenance and customer service were provided for all of the manufactured products.

The Bendix Guidance Systems Division at Teterboro developed and manufactured inertial guidance equipment, gyroscopic devices, stabilization and control systems for space programs, and specialized missile and drone equipment.

The Bendix Test Systems Division at Teterboro developed and manufactured complete support systems for analog, digital, microwave and other devices, including the evaluation of test requirements, design and fabrication of test hardware and software, validation of test hardware compatibility, system configuration management, and logistic support of test systems. These three divisions performed their own research, engineering, marketing, accounting and computer services necessary to support their basic manufacturing operations.

Other Bendix Aerospace Group activities in New Jersey included Bendix Computer-Aided Engineering at Teterboro, which supported the computer-aided engineering requirements of all Bendix aerospace businesses worldwide, and a small Bendix Avionics

Division service facility in Morristown, New Jersey, which serviced and supported general aviation customers in central New Jersey.

The Bendix Electric Power Division in Eatontown developed and manufactured complete electric power-generating and control systems, including brushless AC and DC generators, solid-state control and static power conversion equipment, power-control and load-sensing components, electric starting systems, electric system test and checkout systems, and other related electric power system components. This division also performed the research, engineering, marketing, accounting and computer services necessary to support its basic manufacturing operations.

In addition to the activities of Bendix's Aerospace and Electric Power Divisions, Bendix Field Engineering Corporation, a wholly-owned subsidiary of Bendix, conducted two operations in New Jersey: (1) its Marine Science Services Division at Teterboro provided information to the worldwide ocean-going shipping industry, including ocean current and weather information, and (2) pursuant to a contract with the Federal Environmental Protection Agency ("EPA"), facilities management and maintenance support services were provided at an EPA facility in Edison, New Jersey.

Bendix also sold, both on a wholesale and retail basis, its full range of products to New Jersey customers, and stored inventory in New Jersey at locations owned by others.

II

Since 1965, Bendix had been pursuing an aggressive policy of growth through acquisition, acquiring approximately 35 companies by 1980. This was part of Bendix's program of selective acquisitions and divestitures of companies or assets which would enhance Bendix's existing product areas.

By internal memorandum dated March 31, 1978 to the members of the long-range planning committee, William M. Agee, Bendix's Chairman, stated:

> We believe ourselves to be strong enough financially and managerially to warrant several moves aimed at growth and diversification for the 80's.
>
> –Growth and diversification in the Industrial/
> Energy area.
>
> –Growth and rebalancing in the forest products area.
>
> –Investment in other basic resources that are now depressed and undervalued but that offer strong profit possibilities for the 80's.
>
> –Restructuring of Bendix Home Systems with a view to possible withdrawal in the next few years.

This March 31, 1978 memorandum goes on to state: "We have had an acquisition of a mining company in mind for some time because we are bullish on basic resources for the balance of the century." The

memorandum includes a thorough analysis of the copper industry and the qualities that would be desirable for an acquisition candidate, as well as a detailed discussion of a possible acquisition of Asarco.

Asarco

Asarco is engaged in copper mining and production in the United States and abroad, principally in Latin America. It is also a significant producer of lead, zinc, silver, asbestos, coal and other lesser metals. Asarco also has important equity holdings in Australia, Mexico, Nicaragua, Canada and elsewhere which make significant contributions to earnings.

As stated in an internal memorandum dated April 12, 1978 from Mr. Agee to the Board of Directors, acquisition of Asarco would help Bendix achieve the purposes of its acquisition strategies, which are:

> Reducing our dependence on relatively slow-growing aerospace and automotive OEM market.
>
> Broadening our Industrial/Energy Group to give it size and better definition.
>
> Generating good cash flow in the early 1980's to meet growing capital needs, particularly in aerospace/ electronics to permit it to hold its own in stiffening markets.
>
> Broadening our holding in basic commodities, particularly forest products and in non-fuel minerals that should prosper from the energy problem or which

have other reasons for a strong market position in the 1980's.

Through a series of purchases between December 1977 and November 1978 from Asarco and others, Bendix acquired 20.6% of Asarco's stock.

Two seats on the Asarco 14-member Board of Directors were filled by Mr. Agee and an outside director of Bendix. Because Bendix owned at least 20% of Asarco's stock, it was able to use the equity method of accounting whereby Bendix included its equity share, 20.6%, of Asarco's total earnings in its income.

During the years that Bendix held its investment in Asarco, the trading price of Asarco's stock increased, as did its dividend payments. In Bendix's fiscal 1979, Asarco contributed $ .82 per share to Bendix's total per share earnings of $7.10. In fiscal 1980, Asarco contributed $2.22 a share to Bendix's total per share earnings of $7.68.

In the fall of 1980, Bendix publicly announced that it was considering selling its Asarco stock. Among the reasons given for selling Bendix's interest were: (1) Bendix had decided to reduce its investment in businesses tied to natural resources, and (2) Bendix's investment in Asarco had appreciated considerably.

On October 29, 1980, Bendix and Asarco entered into an agreement under which Asarco agreed to purchase the shares owned by Bendix, at $55 per share. During fiscal 1981, pursuant to an agreement with Asarco to repurchase the shares, Bendix sold its Asarco stock to Asarco at $55 per share for a total sale price of approximately $335,879,500, of which approximately $211,500,000 was the long-term capital gain at issue.

United Geophysical Corporation

United Geophysical Corporation ("UGC") was in the business of seismic surveying, which involves the creation of underground acoustical waves through blasting or mechanical means and the recordation and interpretation of the wave patterns for purposes of locating oil and gas. UGC transacted no business in New Jersey. In 1965, Bendix purchased 100% of the stock of UGC.

The purchase of UGC was part of the effort by Bendix to diversify. Bendix's 1965 Annual Report to its shareholders states:

> We have accelerated our acquisitions program. Here our objective is not merely diversification. We intend to achieve a better balance of our military and commercial-industrial product sales. We intend to enhance and improve our competence in the fields where Bendix's leadership and talents are acknowledged by acquiring strong units that are supplementary. In May we acquired United Geophysical Corporation. This well-established organization is active world-wide in providing geophysical services to oil companies. Complementing our substantial oceanics endeavors, this acquisition will enable us to participate more fully in geophysical operations for petroleum and other minerals on a global basis.

From 1965 to 1968, UGC was included in Bendix's oceanics group. In 1968, the oceanics group was disbanded. Thereafter, UGC was included in Bendix's

industrial/energy group, and in later years the Bendix aerospace group had some oversight over UGC.

During the time that Bendix owned UGC (1965 to 1981), numerous Bendix employees served on UGC's Board of Directors or as UGC corporate officers. Certain senior management of UGC was supplied by Bendix. Murray Weingarten was vice-president of operations at Bendix Field Engineering Corporation ("BFEC") prior to becoming president of UGC in 1967. Bendix transferred Mr. Weingarten to UGC because it believed his experience managing BFEC, which like UGC was a service business, might be helpful in operating UGC and addressing certain of UGC's problems. Under Mr. Weingarten, UGC was reorganized. There was a significant reduction in staff, and new personnel policies were initiated.

Bendix approved UGC's annual financial plan, and Bendix's Board of Directors approved UGC's requests for capital expenditures above a certain dollar limit.

Bendix financed, at approximately $1,000,000 each, the construction of two ships for UGC to be used in marine seismic exploration. The Bendix logo appeared on the ships and other UGC equipment.

Bendix charged UGC, through the intercompany accounts, for services it provided. Among the services Bendix provided were auditing, legal advice, routine legal services, tax advice, tax return preparation, insurance advice, insurance coverage and computer access.

By memorandum dated November 13, 1980 to the Board of Directors, Mr. Agee set forth the reasons for the divestiture of UGC:

> [UGC] does not particularly relate to our other businesses regarding technology, marketing or management. Although UGC has been successful, geophysical seismic data acquisitions is a cyclical business. Historical experience indicates that exploration declines during peak periods of development of new oil and gas discoveries. UGC experienced its best year in 1980 due to the exploration boom caused by energy concerns. This climate has created a high degree of interest in oil and gas exploration, offering an excellent opportunity to divest UGC at a very favorable price.

In July 1981, Bendix sold 100% of the stock of UGC for approximately $80 million, resulting in a long-term capital gain of approximately $41.9 million.

Interest on the Proceeds from the Sale of Asarco and UGC Stock

In 1981 Bendix placed the proceeds from the sale of its 20.6% interest in Asarco and 100% of UGC in an interest-bearing investment account (the "account") with Lehman Brothers, Kuhn, Loeb ("Lehman Brothers"). The account was administered, and all securities on deposit were located, outside of New Jersey. The investments in the account were of a highly-liquid nature, generally with maturities of less than 90 days. During fiscal 1981, the Asarco and UGC proceeds in the account earned approximately $3.4 million in interest.

In late January 1981, Bendix made a public offer to purchase up to four million shares of Bendix stock. As reflected in Bendix's filings with the Securities and Exchange Commission in connection with this offer, the source of funds for the purchase of shares was the proceeds of Bendix's sale of its interests in Asarco and UGC. Furthermore, the cash proceeds from these sales which took place in fiscal 1981 created the liquidity and additional debt capacity needed to enable Bendix to be in a position to make a sizable acquisition if an appropriate acquisition candidate materialized. On August 24, 1982, Mr. Agee requested authorization from the Bendix Board to make a public offer to purchase up to 50% of the shares of Martin Marietta, with the intent to acquire the remaining 50% in exchange for Bendix shares. Martin Marietta's principal business was aerospace related. Bendix had an aerospace group and believed that its business and that of Martin Marietta were complementary.

III

This case poses the question of whether the State of New Jersey can include in the income base of Bendix, capital gain income realized by Bendix on the sale of its 20% interest in Asarco and its 100% interest in UGC and the interest income earned from the investment of that capital gain income. It is helpful at the outset to set forth the observations of the majority of the United States Supreme Court in its most recent decision on the subject. *Container Corp. v. Franchise Tax Board,* 463 U.S. 159, 103 S. Ct. 2933 (1983).

> Under both the Due Process and the Commerce Clauses of the Constitution, a State may not, when imposing an income-

based tax, "tax value earned outside its borders." In the case of a more-or-less integrated business enterprise operating in more than one State, however, arriving at precise territorial allocations of 'value' is often an elusive goal, both in theory and in practice. For this reason and others, we have long held that the Constitution imposes no single formula on the States, and that the taxpayer has the "distinct burden of showing by 'clear and cogent evidence' that [the state tax] results in extraterritorial values being taxed. . ."

One way of deriving locally taxable income is on the basis of formal geographical or transactional accounting. The problem with this method is that formal accounting is subject to manipulation and imprecision, and often ignores or captures inadequately the many subtle and largely unquantifiable transfers of value that take place among the components of a single enterprise. The unitary business/formula apportionment method is a very different approach to the problem of taxing businesses operating in more than one jurisdiction. It rejects geographical or transactional accounting, and instead calculates the local tax base by first defining the scope of the 'unitary business' of which the taxed enterprise's activities in the taxing jurisdiction form one part, and then apportioning the total income of that 'unitary business' between the taxing jurisdiction and the rest of the world on the basis of a formula taking into account objective measures of the corporation's activities within and without the jurisdiction. [citations omitted]. 463 U.S. at 164-165.

The Court set forth the requirements for use of the unitary business/formula apportionment method as: (1) a minimal connection or nexus between interstate activities and the taxing state, and (2) the out-of-state activities of the purported unitary business must be related in some concrete way to the instate activities. With respect to the latter, the Court said:

> The functional meaning of this requirement is that there be some sharing or exchange of value not capable of precise identification or measurement—beyond the mere flow of funds arising out of a passive investment or a distinct business operation—which renders formula apportionment a reasonable method of taxation. Container, supra, 103 S.Ct. at 2940.

There is no single test to determine whether a business is unitary. As the United States Supreme Court has said, and the New Jersey Supreme Court has echoed, "the unitary business concept is not, so to speak, unitary. "*Container, supra,* 463 U.S. at 167, 103 S.Ct. at 2941 (quoted in *Silent Hoist, supra,* 100 N.J. at 18). In fact, in *Container,* the United States Supreme Court refused to say whether any one factor would be sufficient, as a constitutional matter, to prove the existence of a unitary business. Rather, the Court looked at many individual factors taken in combination. *Container, supra,* 463 U.S. at 179-180, 103 S.Ct. 2948. A unitary case is thus intensely factual.

Let me first state as firmly as possible that in the subject case we are dealing with the *income of Bendix,* not

the income of Asarco or UGC. The line of cases from *Mobil* through *Container*[3] dealt primarily with taxation of income earned by the subsidiary and paid to the parent as dividends. Bendix is a different kind of unitary case. In this case, we are not dealing with subsidiary income paid to the parent as dividends, but with income earned by the parent on the sale of its assets. Therefore, unlike the cases from *Mobil* through *Container*, but like the case of *Silent Hoist*, in this case I must look to the activities of the parent, not those of the subsidiary, to determine whether the income is unitary.

For the purpose of this case, interest and capital gain income of the parent have different consequences for unitary purposes than dividend income from a subsidiary.[4] Although *Asarco Inc. v. Idaho State Tax Commission*, 458 U.S. 307, 102 S.Ct. 3103 (1982), makes reference to capital gain income of the parent, that case dealt primarily with dividend income from the subsidiary, holding that five subsidiaries were discrete

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[3] *Mobil Oil Corp. v. Commissioner of Taxes of Vermont*, 445 U.S. 425, 100 S.Ct. 1223 (1980); *Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S. 207, 100 S.Ct. 2109 (1980); *Asarco Inc. v. Idaho State Tax Commission*, 458 U.S. 307, 102 S.Ct. 3103 (1982); *F.W. Woolworth Co. v. Taxation and Revenue Dept. of the State of New Mexico*, 458 U.S. 354, 102 S.Ct. 3128 (1982); *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 103 S.Ct. 2933 (1983).

[4] Under the New Jersey Corporation Business Tax Act, capital gain income of a parent is subject to tax. N.J.S.A. 54:10A-4(k). Dividends of a subsidiary that is 80%–100% owned are not taxed to the parent, and only 50% of dividends from a subsidiary less than 80% owned are taxed to the parent. N.J.S.A. 54:10A-4(k)(5).

entities and the dividend income was not to be included as business income. Although the parties agreed and the Court agreed with the parties that interest and capital gain income derived from the five subsidiaries should be treated in the same manner as dividend income, the issue of whether interest income and capital gain income is the same or different from dividend income was not in dispute. Thus, the Court's acceptance of this treatment is not precedential. *See, W. Milford Tp. v. Garfield Recreation Comm.*, 194 N.J. Super. 148, 158, n.11, *citing Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183, 99 S.Ct. 983, 989 (1979). Notwithstanding the treatment in *Asarco, Inc. v. Idaho*, interest and capital gain income of a parent is different from dividend income received from a subsidiary. Dividend income is that portion of the earnings of a subsidiary corporation that it chooses to distribute to its shareholders. Interest and capital gain income is income earned directly by the parent from the sale or use of the assets of the parent. Thus, conceptually, when determining the unitary issue, the court is justified in looking only at the parent when dealing with capital gain income, while in dealing with dividend income from a subsidiary the court is justified in looking at the subsidiary and its relation to its parent.

In its analysis of the line of case from *Mobil* to *Container*, the New Jersey Supreme Court, in *Silent Hoist & Crane Co. v. Taxation Div. Director*, 100 N.J. 1, 17 (1985), found that *Asarco Inc. v. Idaho* was modified by *Container*. The New Jersey Supreme Court commented that, in *Container*, "the Court appeared resolved to take itself out of the business of being a tax commission and made it clear that the taxpayer has the 'distinct burden of showing by "clear and cogent evidence" that the [state tax] results in extraterritorial values being taxed.'" *Silent Hoist, supra*, at 9-10. The New Jersey Supreme Court

stated that the only restraints the United States Supreme Court will impose are to inquire whether the state court applied the correct standard to the case and whether the judgment was within the realm of a permissible judgment.

Although *Silent Hoist* was a single corporation and Bendix operated through subsidiaries and divisions, the principles of *Silent Hoist* are applicable to the activities of Bendix, a parent corporation. Both cases deal with investment activity by a corporation with strong centralized management and a corporate strategy that combined operating and investment activity to achieve corporate goals. As stated by the New Jersey Supreme Court, "the focus must be on Silent Hoist's investment activity and other aspects of its corporate business and the role the investment activity plays in those other activities." *Silent Hoist, supra,* at 19. It is the corporate activity, not the corporate structure, that should govern the determination of this issue.

The subject of investment activity has been dealt with in *Silent Hoist, supra*:

> As we have seen, *Silent Hoist*'s investment capital was capable of being pledged, liquidated or converted to other uses of the company sales or real estate operations. To describe this economic power as passive does not reflect economic reality.
>
> The taxpayer would have us divide this investment income from the organic whole of the business enterprise. This is, however, not a matter of constitutional law, but a matter of tax preference. Our job is not to rewrite the State's Corporation Business

> Tax but to apply it as intended. New Jersey's tax policy is quite distinct from the majority of states. We do not seek to allocate non-business income to the place of commercial or legal domicile. On the other hand, we accommodate our tax policy to the modern business complex by specifically excluding all dividends from subsidiaries (at least 80% owned) and 50% of other dividend income.
>
> We are more than satisfied here that there was a distinct sharing of the value of common management, accounting and operations that takes the portfolio income of this taxpayer well within the concept of a unitary business. [footnote omitted] At 22-23.

The Director concedes that the activities of Asarco are unrelated to those of Bendix. If the court were to look solely to the activities of Asarco, it could conclude that Asarco is itself a discrete entity. However, here, we are dealing with capital gain income from the sale of Bendix's minority interest in Asarco, and therefore look to the activities of Bendix, not those of Asarco. The activities in issue are investment activities, and the unitary business question is resolved, as in *Silent Hoist*, by examining taxpayer's activities in managing the investment, not the nature of the activities of the subject of the investment.

Viewing the issue in terms of Bendix's investment activity against the background of the decision of the New Jersey Supreme Court in *Silent Hoist* leads this court to the conclusion that the investment was an active one, and that the capital gain income from the investment is unitary and must be included in the income base when

applying the formula for apportioning the income of Bendix within and without the state. The Bendix investment in Asarco was more than passive by virtue of Bendix's control over the investment and because it was a significant part of the Bendix corporate strategy.

The purchase of a minority share in Asarco was part of a Bendix plan for growth and diversification in the 1980's which called for investing in depressed and undervalued basic resources to achieve the planned result of a stronger, diversified company. This investment was made only after a thorough analysis of the copper industry and the qualities of specific acquisition candidates. The Asarco investment was part of a well-orchestrated corporate strategy designed to enhance Bendix's current status, as well as position Bendix for the future. To describe this investment as passive would ignore the New Jersey Supreme Court's decision in *Silent Hoist* and disregard economic reality. The determination of the New Jersey Supreme Court in *Silent Hoist* has set the course for this court to follow.

Bendix relies on the decision of the Supreme Court of Missouri in the case of *James v. International Telephone & Telegraph Corp.*, 654 S.W.2d 835 (Mo. Banc. 1983). In that case, the court held that long-term capital gain income realized from the sale of four subsidiaries was not "business income" for the purpose of income allocation under the Missouri corporation income tax. Missouri is one of approximately 24 states which have adopted the Uniform Division of Income for Tax Purposes Act

("UDITPA").[5] States which have adopted UDITPA only apportion business income, which is income related to the taxpayer's regular course of business. Nonbusiness income, which would include rent and royalties from real or tangible personal property, capital gains, interest, dividends or patent and copyright royalties to the extent they are unrelated to taxpayer's regular course of business, is taxable only in the state of taxpayer's commercial domicile. It would appear that in a UDITPA state most investment income would be nonbusiness income and therefore not apportionable in the non-domiciliary state. The *James* court held that long-term capital gain income realized from the sale of four subsidiaries was not "business income" for the purpose of income allocation under the Missouri corporation income tax. Because Missouri is a UDITPA state, it appears that the court would have had to make a finding that the taxpayer was in the business of buying and selling subsidiaries in order to find that the capital gain income from the sale of the subsidiaries was business

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[5] New Jersey has not adopted UDITPA. All unitary income must be reported and is then apportioned to New Jersey under the three-factor formula. There are no statutory provisions permitting specific allocation ("tracing particular property, receipts, or income to their source or other connection with a state and attributing the item in toto to that state," Hellerstein, *State Taxation, I Corporate Income and Franchise Taxes* (1983), P8.4 at 328) or separate accounting ("a technique of carving out of the overall business of the taxpayer the activities taking place, the property employed in, and the income derived from, sources within a single state, and by accounting analysis ascertaining the profits attributable to that portion of the business." *Id.*, P8.3 at 323).

income. The court concluded that the record did not support that contention of the State of Missouri. Therefore, the Missouri court never reached the question of whether capital gains earned on the sale of a subsidiary is apportionable unitary income where there is a showing of actual planned and controlled corporate investment activity, such as has been shown in the subject case.[6]

Furthermore, there is no claim by taxpayer of double taxation, and there is no evidence that Michigan, the state of Bendix's commercial domicile, has treated the subject income as nonbusiness income.

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[6] I also note that the decision in *Asarco, Inc. v. Idaho, supra,* on the unitary issue was influenced by the business/non-business income distinction because Idaho is a UDITPA state. *See Silent Hoist, supra,* at 22-23, n. 8. There is a significant difference between the *James* case and this case. In *James,* the court had to determine whether the capital gain income was business or nonbusiness income, and made its determination based on the activities of the subsidiaries, not those of the parent. The issue in the present case is not whether the income is business income or nonbusiness income but, as required by the decision of the New Jersey Supreme Court in *Silent Hoist,* whether the investment activity is active or passive. Following *Silent Hoist,* this must be determined by considering the activities of Bendix with respect to the investment, not the activities of the subsidiaries in which it invested. I conclude that the holding in *James v. ITT* is irrelevant to the facts of the present case and that *Silent Hoist* is not only relevant, but is controlling on this court. Therefore, the inclusion of the subject capital gains and interest income does not violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

IV

In accordance with the foregoing reasoning, the capital gain realized by Bendix on the purchase and sale of UGC is also regarded as unitary income from an active investment, as is the income from the proceeds of the Asarco and UGC sales deposited temporarily by Bendix with Lehman Brothers to be held and invested until needed in pursuance of Bendix's corporate strategy. The funds were actually used shortly after their receipt, to further the corporate purposes of Bendix, consistent with its corporate strategy, in the acquisition by Bendix of its stock and the subsequent use of that stock and the funds in connection with its attempted acquisition of Martin Marietta Co.

It should also be noted that there was substantially more interaction between Bendix and UGC, its 100% owned subsidiary, than between Bendix and Asarco. However, in considering the capital gain income of Bendix, the court looks to the investment activity of Bendix, not the activity of the subsidiary or its relationship to its parent.

V

Taxpayer argues that if Asarco and UGC are regarded as part of Bendix's unitary business, the allocation formula as applied by the Director should be modified to include the property, sales and payroll of these two companies—Asarco to the extent of 20% and UGC 100%.

The burden is on Bendix to establish that the tax liability is "out of all appropriate proportion to the business transacted" in the taxing state itself. *Silent Hoist,*

supra, at 10, quoting *Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell*, 283 U.S. 123, 135, 51 S.Ct. 385, 389 (1931). The court finds that there is no reason to alter the statutory allocation formula in this case because the income is capital gain income of Bendix, not income of Asarco or UGC, and there is no proof that the result of the statutory allocation formula, which allocates 7.980727% of Bendix's income to New Jersey, taxes extraterritorial value, or is distorted or unfair.

The Clerk of the Tax Court is directed to enter judgment affirming the fiscal 1981 deficiency tax assessment of the Director.

APPENDIX D

NEW JERSEY STATUTES INVOLVED

54:10A-1. Short title

This act shall be known as the Corporation Business Tax Act (1945).

54:10A-2. Franchise tax; annual payment in lieu of taxes upon intangible personal property; "doing business, employing or owning capital or property in state" defined

Every domestic or foreign corporation which is not hereinafter exempted shall pay an annual franchise tax for the year 1946 and each year thereafter, as hereinafter provided, for the privilege of having or exercising its corporate franchise in this State, or for the privilege of doing business, employing or owning capital or property, or maintaining an office, in this State. And such franchise tax shall be in lieu of all other State, county or local taxation upon or measured by intangible personal property used in business by corporations liable to taxation under this act but, whenever such corporation holds shares of stock in a bank as defined in R.S. 54:9-1, and such bank has not elected to have the taxable value of such shares assessed to it and to pay the tax levied against such shares as provided in R.S. 54:9-14, or, having made such election, such bank subsequently revokes it, the provisions of this section shall not exempt such shares of stock from the tax imposed by chapter 9 of Title 54 of the Revised Statutes.

A foreign corporation shall not be deemed to be doing business, employing or owning capital or property in the State, for the purposes of this act, by reason of (1) the maintenance of cash balances with banks or trust companies in this State, or (2) the ownership of shares of stock or securities in this State if such shares or securities are pledged as collateral security, or deposited with one or more banks or trust companies or brokers who are members of a recognized security exchange, in safekeeping or custody accounts, or (3) the taking of any action by any such bank or trust company or broker, which is incidental to the rendering of safekeeping or custodian service to such corporation.

54:10A-4. Definitions

For the purposes of this act, unless the context requires a different meaning:

* * *

(k) "Entire net income" shall mean total net income from all sources, whether within or without the United States, and shall include the gain derived from the employment of capital or labor, or from both combined, as well as profit gained through a sale or conversion of capital assets. For the purpose of this act, the amount of a taxpayer's entire net income shall be deemed prima facie to be equal in amount to the taxable income, before net operating loss deduction and special deductions, which the taxpayer is required to report to the United States Treasury Department for the purpose of computing its Federal income tax; provided, however, that in the determination of such entire net income,

(1) Entire net income shall not include 50% of dividends which were included in computing such taxable income for Federal income tax purposes;

(2) Entire net income shall be determined without the exclusion, deduction or credit of:

(A) the amount of any specific exemption or credit allowed in any law of the United States imposing any tax on or measured by the income of corporation;

(B) any part of any income from dividends or interest on any kind of stock, securities or indebtedness, except as provided in subsection (k)(1) of this section;

(C) taxes paid or accrued to the United States on or measured by profits or income, or the tax imposed by this act;

(D) net operating losses sustained during any year or period other than that covered by the report;

(E) 90% of interest on indebtedness owing directly or indirectly to holders of 10% or more of the aggregate outstanding shares of the taxpayer's capital stock of all classes; except that such interest may, in any event, be deducted

(i) up to an amount not exceeding $1,000.00,

(ii) in full to the extent that it relates to bonds or other evidences of indebtedness issued, with stock, pursuant to a bona fide plan of reorganization, to persons, who, prior to such reorganization, were bona fide creditors of the corporation or its predecessors, but were not stockholders or shareholders thereof;

(3) The commissioner may, whenever necessary to properly reflect the entire net income of any taxpayer, determine the year or period in which any item of income or deduction shall be included, without being limited to the method of accounting employed by the taxpayer.

APPENDIX E

RULE 29.1
LISTING OF NON-WHOLLY-OWNED AFFILIATES OF ALLIED-SIGNAL INC.

ACE Insurance Company (Bermuda), Ltd.
ACE Insurance Company, Ltd.
ACE, Limited
AIFCO Filters (Egypt)
ASA Investerings (Partnership)
Allied-Apical Company (Partnership)
Allied-General Nuclear Services (Partnership)
Amoricaine de Fonderie Le Chatelet, S.A.
Asia Pacific Resin Corporation
Bendix Atlantic Inflator Company (Partnership)
Bendix Electronic Service Corporation de España, S.A.
Bendix España, S.A.
Bendix Europe Services Technique S.A.
Bendix Europe, S.A.
Bendix Group Superannuation Pty., Ltd.
Bendix Mexicana, S.A. de C.V.
Bendix Mintex Proprietary Limited
Bendix Otomotiv Sanayi Ve Ticaret, A.S.
Bendix-Jidosha Kiki Corporation
Bunker Ramo Electronic Data Systems S.A.
CFE Company (Partnership)
Cataleasco, Inc.
Central Nice, Ltd.
Chico Corporation
Coalition Remedial Efforts, Inc.
Compania Industrial de Fluorita, S.A.

Compania Metalurgica de Parral, S.A.
Coopers Filters, Ltd.
D.B.A. S.I.B.E., SNC (Partnership)
Delaney Gallay Dynamics, Ltd.
Don Brake Lenings Pty.
Don Eastern Sdn Bhd
Doosan Electro-Materials Co., Ltd.
Dynamic Turbocharger Services Pty., Ltd. Queensland
Dynamic Turbocharger Services Pty., Ltd. Victoria
Ferranti plc
Ferranti-Bendix Power Generation Limited
FIAAM Filter S.p.A.
Fram Espana S.A.
Fram Europe A.B.
Fram Europe B.V.
Fram Europe Limited
Fram Europe (Marketing) A.B.
Fram Filter, S.p.A.
France Automobile Service, S.A.
Garrett Comtronics Licensing Corp.
Garrett Turbo India, Ltd.
Globe Auto Electricals, Ltd.
Greyco, S.A.
HBH Company (Partnership)
Hankuk Brake Industrial Co., Ltd.
Industrial Turbines International Inc.
International Robomation Intelligence Inc.
International Technigroup Inc.
International Turbine Engine Corporation
Japan Gasoline Co., Inc.
Jidosha Kiki Co., Ltd.
JSR Allied Corporation
Kalyani Brakes Limited
Kanto Seiatsu Kogyo Co., Ltd.
Katalistiks International Inc.
La Industrial Plastica y Metalurgica, S.A.

Leaseway All-Services, Inc.
Light Helicopter Turbine Engine Company (Partnership)
Lucas Air-Equipment S.A.
Lucky Allied Plastics Corporation
Manbritt Industries, Inc.
Morristown Airport Customs Association (Partnership)
Morton Bendix Company (Partnership)
NGL (Singapore) Pte., Ltd.
Niigata Technos Co., Ltd.
Nikki-Universal Co., Ltd.
Nippon Amorphous Metals Co., Ltd.
Nirlon Synthetic Fibres and Chemicals, Ltd.
Nitto Boseki Company Ltd.
Nittobo-Norplex/Oak Co., Ltd.
Normalair Garrett (Holdings) Ltd.
Normalair Garrett Manufacturing Pty., Ltd.
Normalair Garrett Pty., Ltd.
Normalair Gerrett, Ltd.
Norplex Oak India Limited
Oak-Mitsui (Partnership)
Oak-Mitsui Inc.
Paxon Polymer Company (Limited Partnership)
Prestolite of India Ltd.
Propelentes Mexicanos, S.A.
Quimobasicos, S.A.
Rovert (1987), Ltd.
SAPDCO Bendix (Saudi Arabia) Limited
Seo Han-Bendix Company Limited
Shanghai UOP-UCC Molecular Sieve Co., Ltd.
Sifra Industrie, S.A.
Société d'Etudes et de Constructions Aero-Navales
[SECAN]
Stop Iberica, S.A.
Synektron Corporation
TAC (Aircraft Controls), Ltd.
Technos Co., Ltd.

TENSA, S.A.
Transpar Iberica, S.A.
Turbodina S.A.I.Y.C.
UMP Limited
Union Showa K.K.
Union Texas Exploration Corporation
Union Texas International Corporation
Union Texas Petroleum Holdings, Inc.
Universal Oil Products Company
UOP (Partnership)
UOP B.V.
UOP Canada Inc.
UOP Charitable Foundation, Inc.
UOP Dubai Limited
UOP Equetec Services, Inc.
UOP France, S.A.
UOP GmbH
UOP Iberia, S.A.
UOP Inc.
UOP International Services Limited
UOP International Technology Limited
UOP K.K.
UOP Limited
UOP Management Services, Inc.
UOP Management Services (Saudi Arabia) Limited
UOP M.S. S.p.A.
UOP N.V.
UOP Pacific Ltd.
UOP Process International, Inc.
UOP Processos Industrials do Brasil Ltda.
UOP S.p.A.
USHA Amorphous Metals Ltd.